Petition

81-1444

No. _____

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

JOHANN SCHMIDT and LELAND POLLARD, individually and doing business as Schmidt & Pollard, a California partnership,

Petitioners,

vs.

OAKLAND UNIFIED SCHOOL DISTRICT, *et al.*

Respondents

PETITION FOR WRIT OF CERTIORARI AFTER JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Does a school district have the inherent authority to assign school construction contracts on the basis of race, analogous to the power to integrate dual school systems, as part of its educational function?

2. May a state legislature require that school construction contracts be awarded to the lowest responsible bidder, even if this results in the award of relatively few contracts to minority contractors, or is the state constitutionally compelled to adopt a program which favors minority contractors?

3. May a local government agency such as a school district adopt an affirmative action program in the absense of, and contrary to, its legislatively delegated authority because of the overriding importance of remedying the lingering effects of past discrimination?

4. Does a white contractor who submitted the low bid for a school construction project, and who was denied that contract solely on the basis of race, state a claim for relief under 42 U.S.C. §§ 1981, 1983 (1976) as against a school district's defense that it has adopted (contrary to state law and in the absense of statutory authority) an affirmative action minority contractor program?

5. May the federal court of appeals refuse to apply a state low-bid statute in a case claiming damages for violation of a white contractor's civil rights on the grounds that greater minority contractor participation in school construction is a more important policy than that underlying the low-bid law?

IN THE

Supreme Court of the United States

JOHANN SCHMIDT and LELAND POLLARD, Individually and Doing Business as SCHMIDT & POLLARD, a Partnership; JOT BROWN, LUZ BROWN, and JOT BROWN, Inc., a California corporation,

Plaintiffs-Appellants,

v.

OAKLAND UNIFIED SCHOOL DISTRICT, OAKLAND BOARD OF EDUCATION, DAVID TURKER, JR., MELVIN J. CAUGHELL, CHARLES W. GOADY, BARNEY E. HILBURN, LORENZO N. HOOPES, SEYMOUR M. ROSE, and PEGGY STINNETT,

Defendants-Appellees

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PETITION FOR WRIT OF CERTIORARI AFTER JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners pray that a writ of certiorari be issued to the United States Court of Appeals for the Ninth Circuit to review this case after judgment.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit from which review is sought is reported at 662 F.2d 550, (9th Cir. 1981). A copy of this opinion is included in the Appendix as Exhibit A.

The order of the United States District Court for the Northern District of California granting summary judgment to defendants and denying plaintiffs' motion for summary judgment is unreported. A copy of that order is included in the appendix as Exhibit B.

JURISDICTION

This is an action for violation of plaintiffs' civil rights brought pursuant to 42 U.S.C. §§ 1981, 1983 (1976). Jurisdiction of the district court is founded upon 28 U.S.C. §§ 1331, 1343 (1976).

Jurisdiction of this Court to review the decision of the United States Court of Appeals for the Ninth Circuit is grounded upon 28 U.S.C. § 1254(1) (1976). Judgement was entered in the Court of Appeals on November 16, 1981. A copy of the Notice of Entry of Judgment is included in the Appendix as Exhibit C.

No motion for rehearing was filed.

CONSTITUTIONAL PROVISION, STATUTES AND REGULATIONS INVOLVED

Amendment XIV of the Constitution of the United States:

Section 1. Citizens of the United States.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State

shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 5. Power to Enforce Amendment.

The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

42 U.S.C. § 1981 (1976):

Equal rights under the law.

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. § 1983 (1976):

Civil action for deprivation of rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Cal. Educ. Code § 39,640 (West 1978):

The governing board of any school district shall let any contracts involving an expenditure of more than five thousand dollars ($5,000.00) for work to be done or more than eight thousand dollars ($8,000.00)[1] for materials or supplies

[1] These limits were increased to $8,000.00 and $12,000.00 respectively by amendment in 1977 Cal. Stat. Chap. 631 § 2.

to be furnished, sold, or leased to the district, to the lowest responsible bidder who shall give such security as the board requires, or else reject all bids. This section applies to all materials and supplies whether patented or otherwise.

The "Minority-Owned Business Participation Policy" of the Oakland Unified School District is included in the Appendix as Exhibit D by reason of its length.

STATEMENT OF THE CASE

The agreed upon facts of this case were presented to the district court in a joint pretrial statement filed June 27, 1978, a copy of which is included in the Appendix as Exhibit E. There is no dispute as to the material facts of this case.

Defendant Oakland Unified School District is a local agency of the State of California established to administer the Oakland school system. California statute authorizes school districts to award construction contracts only to the "lowest responsible bidder." In 1975 the Oakland Unified School District adopted a "Minority-Owned Business Participation Policy", (revised 1977), which required that in order to qualify as a "'responsible bidder' all general contractors bidding on school construction projects over $100,000.00 shall under this program use minority owned businesses for individual contract dollar amounts which total at least 25% of the general contract dollar bid." (Appendix Exhibit E). This "minority set-aside" policy was not specifically authorized by any state statute or program.

In March 1977, respondent school district advertised for bids to perform a school renovation project. Plaintiff Schmidt & Pollard, a partnership consisting of two white general contractors, submitted the lowest bid. Thomas & Cottrell, a joint venture, 65% owned by a white contractor and 35% owned by a black contractor, submitted the next lowest bid. Schmidt & Pollard had 16.1% minority subcontractor participation while Thomas & Cottrell had no minority subcontractors.

Defendant Oakland Unified School District, through its Board of Education determined that Thomas & Cottrell met the terms of the Minority-Owned Business Participation Policy

because Mr. Cottrell, a 35% owner of the joint venture, was black. Accordingly, the School District denied the contract to plaintiffs and awarded it to the second lowest bidder.

On August 25, 1977, plaintiffs filed suit in the United States District Court for the Northern District of California alleging violation of their civil rights under 42 U.S.C. § 1981, 1983 (1976) for denial of the right to make contracts and deprivation of the rights, privileges, and immunities of citizenship in that they were deprived of the construction contract award solely on the basis of their race.[2]

The parties filed cross-motions for summary judgment and, on December 6, 1979, the district court granted summary judgment to defendants on the grounds that "even if defendants' affirmative action plan was unconstitutional, defendants acted in good faith in adopting and implementing the plan." (Appendix B) Plaintiffs appealed to the Ninth Circuit.

During the pendency of the appeal, this Court decided *Owen v. City of Independence*, 445 U.S. 622 (1980), holding that local government agencies are not entitled to "good faith" immunity. At oral argument, plaintiffs urged the Court of Appeals to reverse and remand the case. On November 5, 1981, the Court of Appeals entered its judgment recognizing that the School District was not entitled to the defense of immunity, but affirming the dismissal on a ground never addressed by the district court—that plaintiffs' allegations did not state a claim for relief. It is this judgment which plaintiffs now request this Court to review upon writ of certiorari.

ARGUMENT

I. BY TRANSFERRING AUTHORITY TO INSTITUTE MINORITY "SET ASIDE" PROGRAMS FROM THE LEGISLATURE TO LOCAL SCHOOL DISTRICTS, THE COURT BELOW CREATES THE

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[2] "If either Schmidt or Pollard had been a member of one of the minority groups specified in the AAP [affirmative action program], the proposal of their partnership would have been accepted. It is specious, therefore, to argue that the plaintiffs did not allege racial discrimination."

662 F.2d at 555.

POTENTIAL FOR THOUSANDS OF INCONSISTENT AFFIRMATIVE ACTION PROGRAMS AND UNRESTRICTED VIOLATION OF CIVIL RIGHTS.

In *Fullilove v. Klutznik*, 448 U.S. 448 (1980), this Court set forth a method for analyzing a minority "set aside" construction program which focused first upon the power of the governmental entity to adopt it and then upon the means chosen. The *Fullilove* program was valid because the United States Constitution granted Congress the power to adopt such programs and the means chosen were not unreasonable. Appellants submit that *Fullilove* is the controlling law in this case.

However, the court below rejected the *Fullilove* analysis of the Oakland "set aside" program. Instead it created an unprecedented doctrine that the remedying of past discrimination in the construction industry is an issue of such importance that no source of authority to implement the program need be found. In fact, under the lower court's opinion, the school district is permitted to disregard specific statutory limitations upon its power to award construction contracts. Appellants suggest that such a ruling strikes at the heart of limited constitutional government, authorizing as it does every agency and instrumentality of the government to transgress its specifically delegated powers whenever the end sought to be accomplished is of sufficient importance.

If allowed to stand, the opinion in this case will be the starting gun for a race among the thousands of school districts and other local agencies to institute their own "set aside" programs in the absense of, and many times contrary to, restrictions established by carefully considered legislative deliberation.

A. *The Fullilove "Power to Enact" Analysis*

Fullilove v. Klutznik, supra, analyzed at length the validity of a congressional program which allocated certain funds for construction projects, attaching the requirement that 10% of the dollar volume of each construction contract must be allocated to minority subcontractors. Although the *Fullilove* program was

substantially more limited than the one at issue in this case,[3] petitioners do not challenge the reasonableness of the Oakland "set aside" program.

Rather, the aspect of *Fullilove* which is crucial to the present case is the holding that any government instrumentality which adopts a program assigning construction contracts on the basis of race must demonstrate that it has the *power* to do so. Congress, which enacted the minority "set aside" program analyzed in *Fullilove*, is the only government instrumentality so far determined by this Court to have such authority.[4] For "any preference based on racial or ethnic criteria must necessarily receive a most searching examination to make sure that it does not conflict with constitutional guarantees." 448 U.S. at 491.

The *Fullilove* Court analyzed the minority preference program in two steps:

> At the outset, we must inquire whether the *objectives* of this legislation are within the power of Congress. If so, we must go on to decide whether the limited use of racial and ethnic criteria, in the context presented is a constitutionally permissible *means* for achieving the congressional objectives and does not violate the equal protection component of the Due Process Clause of the Fifth Amendment.

448 U.S. at 473.

The spending, commerce and general welfare clauses of article I section 8 of the United States Constitution were found by

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[3] The program approved in *Fullilove* set aside 10% of a specified appropriation for certain projects, while the Oakland program sets aside 25% of all funds for all school construction projects. The *Fullilove* program expended itself in approximately a year, while the Oakland policy remains in effect until the school district acts to change it. And perhaps most importantly, under the *Fullilove* program a minority general contractor must still utilize the specified percentage of minority subcontractors, while under the Oakland program a minority general contractor automatically qualifies regardless of whether or not he has any minority subcontractors.

[4] Justice Powell in his concurring opinion in *Fullilove* stated, "Nor do I conclude that use of a "set aside" always will be an appropriate remedy or that the selection of a "set aside" by any other governmental body would be constitutional." 448 U.S. at 515 n.14.

this Court to contribute to the power of Congress to adopt a minority contractor preference program. Moreover, "a review of our cases persuades us that the objectives of the MBE program are within the power of Congress under section 5 'to enforce, by appropriate legislation' the equal protection guarantees of the fourteenth amendment." 448 U.S. at 476.

The *Fullilove* court stressed the unique authority of Congress in our constitutional system to deal with such matters. "Here we pass, not on a a choice made by a single judge or *school board*, but on a considered decision of the Congress and President."[5] 448 U.S. at 473 (emphasis added).

Had it followed the *Fullilove* analysis, the court below would have found that the local school district lacks any constitutional authority and that its sole source of power lies in a grant from the California legislature. As demonstrated below, the *only* authority of respondent school district to award construction contracts requires that they be let to the lowest responsible bidder. Since respondent denied the contract petitioners, the lowest reponsible bidder, and awarded it to a higher bidder which is minority-owned, the conclusion would have been that respondent acted without authority and its MBE program, insofar as the facts of this case are concerned, was invalid.[6]

B. *The Lower Court's "Important Interest" Analysis*

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[5] This theme is reiterated several times in the *Fullilove* opinion.

> Here we deal, as we noted earlier, not with the limited remedial powers of a federal court, for example, but with the broad remedial powers of Congress. It is fundamental that in no organ of government, state or federal, does there repose a more comprehensive remedial power than in the Congress, expressly charged by the Constitution with competence and authority to enforce equal protection guarantees.

448 U.S. at 483.

[6] This was precisely the holding in *Associated General Contractors v. San Francisco Unified School District*, 616 F.2d 1381 (9th Cir. 1980), invalidating a virtually identical school district minority "set aside" program:

> Therefore, we hold that it is constitutionally acceptable for a legislative determination to foreclose, as it does in this case, the Board from voluntarily adopting an affirmative action policy.

616 F.2d at 1390.

The court below, unlike this court in *Fullilove*, made no inquiry into the sources of respondent's asserted authority to institute this "set aside" program. Although recognizing that "state law may prevent a political subdivision of a state from performing selected functions" (662 F. 2d at 559), the court never analyzes the California statutes which in fact allocate and define the authority of the Oakland Unified School District. This is in sharp contrast to this Court's detailed inquiry into Congress' constitutional powers to implement a minority "set aside" program in *Fullilove*.

Instead the lower court appears to find an inherent power in the school district to establish such a program.

> Finally, it is perfectly appropriate that the school board be the body to assert an interest in remedying the effects of past discrimination in this particular industry. The school board is charged with the vital responsibility of educating children. The declaration of Superintendent Love states that 84% of the students enrolled in the school district are non-white. For the school district to perpetuate the effects of past discrimination in school construction contract awards could seriously undermine its credibility in a community with so large a non-white population thereby imparing its capacity to educate children. We see nothing improper in the School District's laudable desire to set an example to the children whom its responsible for educating. To the contrary, the AAP is highly relevant to the School District's Mission.

662 F. 2d at 559.

The only authority cited in the opinion which might support such a conclusion is *North Carolina Board of Education v. Swann*, 402 U.S. 43 (1971), in which this Court held unconstitutional a state statute which forbade the assignment of children to schools on the basis of race. In a unanimous opinion Chief Justice Burger there stated "school authorities have wide discretion in formulating school policy, and that as a matter of educational policy school authorities may well conclude that some kind of racial balance in schools is desirable quite apart from any constitutional requirements." 402 U.S. at 45. Petitioners however

submit that desegregation cases are *sui generis* and that the "school district's mission" does not inherently authorize it to institute a minority contractor preference.[7]

The court below thus substitutes for the *Fullilove* "governmental authority" analysis its own inquiry into whether an "important interest" is represented by the Affirmative Action Plan. It expressly rejects petitioner's argument that the local school district must find statutory authority to adopt the plan or the plan must fall:

> appellants [petitioners here] argue, however, that regardless of whether a *state* has an important interest in remedying discriminatory effects, the *School District* does not. They argue that a political subdivision can assert such an interest only if it has made, and is competent to make, findings of identified discrimination. Although we do not share appellants view on this point, there is some support for the argument..."[8]

662 F. 2d at 558.

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[7] In fact, the North Carolina anti-busing statute was specifically passed to frustrate a desegregation plan lawfully mandated by a federal court. Enforcement of the statute thereby violated the federally-established rights of school children to an integrated education. Respondents make no assertion that the 1972 low bid statute was instituted for racially discriminatory purposes or to frustrate the rights of minority contractors to bid on school construction projects.

[8] The 9th Circuit erroneously asserts that in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), "four other Justices have adopted a contrary position, *See Bakke*, 438 U.S. at 366-67 n.42 (Brennon, White, Marshall, and Blackmun, J.J., concurring and dissenting)..." 662 F.2d at 558. In fact, the Brennan opinion approves affirmative action programs "at least when appropriate findings have been made by judicial, legislative, or administrative bodies *with competence to act in this area*. 438 U.S. at 325. In footnote 42 of that opinion, these four justices conclude that "generally, the manner in which a state chooses to delegate governmental functions is for it to decide... California, by constitutional provision, has chosen to place authority over the operation of the University of California in the board of regents... Control over the University is to be found not in the legislature but rather in the regents who have been vested with full legislative (including policy making), administrative, and ajudicative powers by the citizens of California." 438 U.S. at 366 n.42. *See* the opinion of Justice Powell in *Fullilove supra* "First, the governmental body that attempts to impose a race-conscious remedy must have the authority to act in response to identified discrimination." 448 U.S. at 498.

Thus, the lower court completely ignored the crucial fact that, unlike Congress or the Regents of the University of California, respondent school district is an agency of strictly limited power. "Such a board is merely an administrative agency created by statute and invested only with the powers expressly conferred, subject to the limitations thereto attached by the legislature." *Grigsby v. King*, 202 Cal. 299, 304; 260 P. 789 (1927). *See also, Hall v. City of Taft*, 47 Cal.2d 177, 302 P.2d 574 (1956); *Ferdig v. State Personnel Board*, 71 Cal.2d 96, 77 Cal. Rptr. 224, 450 P.2d 591 (1969). The sole authority granted to respondent school district is to award school construction contracts to the lowest responsible bidder. Cal. Educ. Code § 39640 (West 1978); *Associated General Contractors, supra.*

Associated General Contractors invalidated a nearly identical "set aside" program adopted by the San Francisco Unified School District. The court there, applying the *Fullilove* analysis, found that the district lacked authority to adopt the program and was bound by the state's low bid law. Had the court in this case applied *Fullilove*, it would have come to the same conclusion.

C. *The Chaos Created by the Decision of the Lower Court's Rejecting the Concept that a Government Agency's Powers Can Be Statutorily Limited.*

It is hornbook law that an administative agency may promulgate regulations only within the sphere of authority delegated to it by the legislative branch. No matter how laudable or well intentioned, if the agency exceeds its authority, the *ultra vires* action is invalid. Thus the Department of Health, Education and Welfare could not promulgate regulations governing employment discrimination in schools when the statute authorized it to regulate only discrimination in the educational programs of those schools. *Islesboro School Committee v. Califano*, 593 F.2d 424 (1st Cir. 1979); *Romeo Community Schools v. HEW*, 600 F.2d 581 (6th Cir. 1979); *Junior College District of St. Louis v. Califano*, 597 F.2d 119 (8th Cir. 1979). The same is true with regard to affirmative action regulations. *Liberty Mutual Insurance Co. v. Friedman*, 639 F.2d 164 (4th Cir. 1981).

This rule is rejected by the court below in favor of a new principle which holds that the administrative agency need not

demonstrate delegated authority to promulgate affirmative action regulations because of the importance of the policy involved. The lower court fails to comprehend the significance of the *Fullilove* inquiry into the power of Congress to pass the minority preference provisions. Quoting from *Fullilove* the statement, "here we pass, not on a choice made by a single judge or a school board, but on a considered decision of the Congress and the President", the court below makes the remarkable statement that "the intended import of that distinction is not entirely clear. . . ." 662 F. 2d at 557. The lower court then draws the incorrect conclusion that the enabling clause of the fourteenth amendment "was invoked to establish the legitimacy of the government interest asserted as a justification for the challenged statute" in *Fullilove*. *Id.* Clearly the court did not understand that Section 5 of the fourteenth amendment is not a justification for the asserted government interest, but the source of governmental authority to pass the statute in question.

If allowed to stand, the lower court's decision negates the first step in the *Fullilove* analysis, creating the spector of myriads of government agencies promulgating regulations and policies not on the basis that they have statutory authority to do so but on the basis that such regulations are justified by an important governmental interest. "Isolated segments of our vast governmental structures are not competent to make those decisions, at least in the absence of legislative mandates and legislatively determined criteria." *Regents of the University of California v. Bakke*, 438 U.S. at 309.

The disagreement between petitioners and respondents centers on whether school district minority contractor preference programs are governed by *Fullilove* (requiring specific legislative authority) or by *North Carolina Board of Education v. Swann*, (recognizing inherent authority over desegregation). This court should grant certiorari to provide guidance to school districts across the country concerning the extent to which they may prefer minority contractors on the basis of race in school construction projects.

II.

THE DECISION BELOW UNREASONABLY INTERFERES WITH THE LEGISLATIVE POLICIES OF THE STATE OF CALIFORNIA

The California legislature has made the determination that school construction contracts shall be let to the "lowest responsible bidder." Cal. Educ. Code § 39640. The Ninth Circuit Court of Appeals held in 1980 that a San Francisco Unified School District Minority-Owned Business Participation Policy virtually identical to the Oakland policy was void because it conflicted with the state low bid statute. *Associated General Contractors v. San Francisco Unified School District*, 616 F.2d 1381 (9th Cir. 1980). The court below has apparently repudiated the San Francisco case by applying its "important interest" analysis. In so doing, the court deprives the California legislature of its authority to establish a system for awarding school construction contracts violating the doctrine that "when we have discussed the remedial powers of a federal court, we have been alert to the limitation that 'the power of the federal courts to restructure the operation of local and state governmental entities' is not plenary." *Fullilove v. Klutznik*, 448 U.S. at 483.

The determination by the California legislature that public works contracts should be awarded to the lowest responsible bidder is grounded in strong policy considerations.

> It was designed to protect the public fisc by preventing public officials from awarding contracts uneconomically on the basis of special friendships. [citation omitted] Such friendships might be based on mutual fondness, bribery, political co-partisanship, racial/ethnic affinity, or any combination of these. It is highly unlikely that minority contractors of that day were in such positions of special friendship; instead such arrangements harmed the racial outsiders. If anything, the purpose of the low bid law was to help such outsider contractors.[9]

Associated General Contractors v. San Francisco Unified School District, 616 F.2d at 1391.

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[9] In 1974, the Attorney General of California issued an opinion concluding that a policy which limits the award of state printing contracts to union printing

The California Supreme Court has interpreted the low-bid policy as requiring that "a contract must be awarded to the lowest bidder unless it is found that he is not responsible, i.e. not qualified to do the particular work under consideration." *Inglewood-Los Angeles County Civic Center Authority v. Superior Court*, 7 Cal. 3d 861, 867, 500 P.2d 601, 604, 103 Cal. Rptr. 689, 692 (1972). *See also, West v. City of Oakland*, 30 Cal. App. 556, 159 P. 202 (1916).

The court below has effectively invalidated California's legislative determination on the low bid issue, approving instead the decision by respondent school district to award the contract to someone other than the lowest responsible bidder. "[I]t is perfectly appropriate that the school board be the body to assert an interest in remedying the effects of past discrimination in this particular industry ... we see nothing improper in the school district's laudable desire to set an example to the children whom it is responsible for educating." 662 F.2d at 559.

The lower court's decision

> boils down to an assertion that if a state legislature and a state agency disagree about the wisdom of affirmative action, the agency should prevail (if it is the entity in favor of affirmative action). This we cannot accept. The competent entity in such a situation is always the legislature, whose members are charged with responsibility and accountable to the people for such decisions.

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companies violates the state low bid statute. After reviewing the statutory framework which requires the award of such contracts to the lowest responsible bidder, the Attorney General stated:

> Clearly the purpose reflected in the statutory scheme above described is directly responsive to the end of procuring the most economically advantageous contract possible and of protecting the taxpayers from fraud, corruption, and carelessness on the part of public officials and the waste and dissipation of public funds. Just as clearly, limitation of bidding to any single class of employer contravenes the underlying policy of efficiency and economy to the extent that such limitation imposes a nonstatutory and informal pre-bidding selection upon the contracting process, precluding from the bidding procedure by means not legally sanctioned, all who do not possess membership within the favored class.

57 Ops. Cal. AG 574 (1974).

> The Supreme Court has insisted that "explicit [legislative or presidential] action, especially in areas of doubtful constitutionality, requires careful and purposeful consideration by those responsible for enacting and implementing our laws. Without explicit action by lawmakers, decisions of great constitutional import and effect would be relegated by default to administrators who, under our system of government are not endowed with authority to decide them." *Green v. McElroy*, 360 U.S. 474, 507, 79 S. Ct. 1400, 1491, 3 L. Ed.2d 1377 (1959).
>
> "Stacked deck" affirmative action, the constitutionality and wisdom as social policy of which are sharply debatable is precisely the kind of policy decision in which legislatures have the greatest advantage in competence over local agencies such as school boards.

Associated General Contractors v. San Francisco Unified School District, 616 F.2d at 1390.

In *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), (as in *Fullilove*) a majority of the Court asserted that the University must first demonstrate the statutory power to enact such a policy.[10] Justice Powell in the opinion of the Court found that "isolated segments of our vast governmental structures are not competent to make those decisions, at least in the absence of legislative mandates and legislatively determined criteria." 438 U.S. at 309. Justice Brennan, joined by Justices White, Marshall and Blackmun, recognized that "generally the manner in which a state chooses to delegate governmental functions is for it to decide." 438 U.S. at 366 n.42.

By removing from the California legislature the ability to determine that race shall not be taken into account in awarding school construction contracts, the court below has in effect determined that a general constitutional principle requires invalidation

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[10] They disagreed on the results of this inquiry, Justice Powell finding that the regents lacked such authority while the other four Justices determined that the regents had been granted legislative power by the California Constitution and their organic statute.

of a carefully considered state legislative scheme.[11] This is a perversion of the doctrine announced by this Court in *North Carolina Board of Education v. Swann*, 402 U.S. 43, 45 (1971), that

> if a state-imposed limitation on a school authority's discretion operates to inhibit or obstruct the operation of a unitary school system or impede the disestablishing of a dual school system, it must fall; state policy must give way when it operates to hinder vindication of federal constitutional guarantees."

The court below has in effect found that the low bid system has operated to create such an infringement on the constitutional rights of minority contractors that the system may be disregarded by local school districts. The necessary conclusion from this holding is that the California low bid statute must give way because it operates to hinder vindication of federal constitutional guarantees. Any pronouncement that all government low bid statutes must be disregarded because they have created large statistical disparities between minority and non-minority contractors should issue from this Court.[12]

III. THIS CASE CREATES SUBSTANTIAL DISAGREEMENT AMONG THE FEDERAL CIRCUITS CONCERNING THE RELATIONSHIP BETWEEN GOVERNMENTAL LOW-BID STATUTES AND AFFIRMATIVE ACTION PROGRAMS ENACTED CONTRARY THERETO.

Rule 17 of this Court provides that one consideration in determining whether to grant a writ of certiorari is "when a

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[11] *In Associated General Contractors, supra*, the same 9th Circuit Court of Appeals rejected this argument saying "whether Courts might think that voluntary affirmative action should be a favored policy is of no moment. There is no constitutional duty for the state or the board to take affirmative action here. This holding would be vitiated if on constitutional grounds we denied the state the power to decide that certain policies outweigh the policy of affirmative action, and to enforce that decision against the agencies it has created. We decline to do so."

616 F. 2d at 1389.

[12] *Fullilove* describes at length congressional findings of such disparities. The court below observes that "the disparity found by the school board at the local level mirrors the disparity found by Congress nationally." 662 F.2 at 559.

federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter. . . ." Such a conflict among the circuits now exists.

The Sixth Circuit has determined that, in the absense of legislative authority, a government agency may not institute a minority business enterprise policy which violates existing low bid statutes, as have federal district courts for Alabama (Eleventh Circuit) and Delaware (Third Circuit). Petitioners are aware of no court of appeals decisions supporting the Ninth Circuit's holding in the present case.

Owen of Georgia, Inc. v. Shelby County, 648 F.2d 1084 (6th Cir. 1981), was a suit by a low bidder who was denied the award of a county construction project because another bidder employed a higher proportion of minority workers and was locally owned. Holding that the low bidder had a cause of action against the county, the court said, "[T]hese concerns are not recognized in state or local statutes, but represent the county's beliefs on controversial social and economic questions," 648 F.2d at 1092, and were therefore invalid under the local statute.

Central Alabama Paving, Inc. v. James, 499 F. Supp. 629 (M.D. Ala. 1980), invalidated preferences for minority-owned and women-owned contracting firms in the award of federal highway construction contracts on the grounds that Congress had not authorized such preferences and the Department of Transportation had no authority to promulgate them. *Pettinaro Construction Co. v. Deleware Authority for Regional Transit*, 500 F. Supp. 559 (D. Del. 1980), was a suit by a low bidder who was denied a construction contract because of failure to allocate fifteen percent of the bid to minority-owned businesses. The case held that the local government agency must prove that it is competent to make findings of past discrimination, and that it has made such findings, in order to uphold the set-aside program.

The decision in the present case is somewhat supported by *Valentine v. Smith*, 654 F.2d 503 (8th Cir. 1981), approving a University of Arkansas affirmative action hiring program which allocates a certain number of jobs to minorities.[13]

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[13] Even the Valentine court however, recognized that only certain governmental agencies may institute affirmative action programs. "The Supreme Court has

But the decision below directly contravenes *Associated General Contractors v. San Francisco Unified School District*, 616 F.2d 1381, 1391 (9th Cir. 1980), which held that "the Board lacked authority to adopt its affirmative action policy because the policy was inconsistent with the California low bid law."[14] It also conflicts with the holding of the California Supreme Court in *Inglewood-Los Angeles County Civic Center Authority v. Superior Court*, 7 Cal.3d 861, 103 Cal. Rptr. 689 (1972), that a public contract may not be denied to the lowest bidder unless he is unfit to perform it.

On a related issue, *Setser v. Novack Investment Co.*, 638 F.2d 1137 (8th Cir. 1981), holds that a white prospective employee states a cause of action under 42 U.S.C. § 1981 against an employer whose affirmative action program has resulted in the refusal to hire him.

> Similarly, in an action for money damages, we are persuaded that an alleged violation of section 1981 cannot be obviated by simple reliance upon an affirmative action plan. Therefore, we hold that appellees' efforts to institute

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determined that the Congress, Federal Courts, and, in some instances the states have the compentency to make such findings of past discrimination as are sufficient to justify a race-conscience remedy."

654 F.2d at 508.

[14] Although the court below attempts to distinguish the *Associated General Contractors* case because it was a facial challange rather than an action for damages, the instant opinion never addresses the true holding in that case; California school districts are forbidden by statute to favor contractors on the basis of race, or on the basis of other considerations not related to their competence and responsibility as contractors. Nor does the court below explain why the school district, in clearly violating petitioner's civil rights is not liable even though the policy if challenged on its face would be found unlawful.

> "Assuming appellent was told that but for his race a job would have been available to him, then appellees have created an absolute preclusion of whites from consideration for employment. Appellees' argument that reliance on their affirmative action program gives them, in essence, a license to discriminate on racial grounds cannot be accepted. We refuse to agree that the instituition of an affirmative action plan absolutly sanctions racial discrimination."

Setser v. Novack Investment Co., 638 F. 2d 1137 at 1143 (8th Cir. 1981).

an affirmative action plan do not bar appellant as a matter of law from seeking a monetary award from the jury for his legal claims.

638 F.2d at 1145.

This Court should grant certiorari to review this case in order to resolve the uncertainty now created in every state and federal program which has a low bid statute and contemplates implementation of an affirmative action or "set aside" program.

CONCLUSION

In *Fullilove v. Klutznick*, this Court underscored its limited holding that a minority set-aside program might be adopted by Congress under limited circumstances, by saying "here we pass, not on a choice made by a single judge or a school board, but on a considered decision of the Congress and the President."[15] 448 U.S. at 473. The court below has ruled that the same power possessed by Congress to institute remedial racial quotas may be exercised by a local school district despite a state legislative mandate to the contrary. The far-reaching implications of this contradiction of the *Fullilove* rule for myriads of government agencies should be reviewed by this Court.

Respectfully submitted,

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Attorney for Petitioners

[15] Again we stress the limited scope of our inquiry. Here we are not dealing with a remedial decree of a court but with the legislative authority of Congress. Furthermore, petitioners have challenged the constitutionality of the MBE provision on its face; *they have not sought damages or other specific relief for injury allegedly flowing from specific applications of the program; nor have they attempted to show that as applied in identified situations the MBE provisions violated the constitutional or statutory right of any party to this case.*

Fullilove v. Klutznick, 488 U.S. at 480 (emphasis added).

Appendix

EXHIBIT A

Johann SCHMIDT and Leland Pollard, Individually and Doing Business as Schmidt & Pollard, a Partnership; Jot Brown, Luz Brown, and Jot Brown, Inc., a California corporation, Plaintiffs-Appellants,

v.

OAKLAND UNIFIED SCHOOL DISTRICT, Oakland Board of Education, David Tucker, Jr., Melvin J. Caughell, Charles W. Goady, Barney E. Hilburn, Lorenzo N. Hoopes, Seymour M. Rose, and Peggy Stinnett, Defendants-Appellees.

No. 80-4005.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted June 8, 1981.

Decided Nov. 5, 1981.

General contractors filed an action against a school district, the school board and individual members of the school board challenging the validity of the affirmative action plan applicable to general contractors who submit bids for construction contracts solicited by the school district. The United States District Court for the Northern District of California, Stanley A. Weigel, J., held that all of the defendants were immune from damages for any actions taken in good faith and that all defendants had acted in good faith, and, therefore, granted summary judgment for the defendants. Appeal was taken. The Court of Appeals, Fletcher, Circuit Judge, held that: (1) the individual school board members were entitled to qualified immunity, since they acted in good faith in adopting the affirmative action plan; (2) the district court had subject-matter jurisdiction, since the facts alleged, if true, would establish racial discrimination; (3) the school district's affirmative action plan, which provides that, in order to be a "responsible bidder" for purposes of the California statute requiring a school district to award to the "lowest responsible bidder" any contract for work involving more than $12,000, a general contractor bidding on a school construction project over $100,000 must use minority-owned businesses for at least 25% of the dollar amount

of the total bid is constitutional; and (4) it was not appropriate for the Court of Appeals to determine the state law issue of whether damages would be available.

Affirmed.

Farris, Circuit Judge, concurred with an opinion.

1. Civil Rights ⇐ 13.8(1)

School board members are entitled to qualified immunity from money damages in civil rights actions, for actions taken in good faith. 42 U.S.C.A. § 1983.

2. Civil Rights ⇐ 13.8(1)

School board members acted in good faith in adopting policy providing that, in order to be "responsible bidder" for purposes of California statute requiring school district to award to "lowest responsible bidder" any contract for work involving more than $12,000, general contractor bidding on school construction project over $100,000 must use minority-owned businesses for at least 25% of dollar amount of total bid, and, thus, were immune from liability for damages in civil rights action challenging policy. West's Ann.Cal.Educ.Code § 39640; 42 U.S.C.A. § 1983; U.S.C.A.Const.Amends. 5, 14.

3. Federal Courts ⇐ 244

Action challenging validity of affirmative action plan applicable to general contractor who submits bid for construction contracts solicited by school district contained allegations of sufficient facts which, if true, would establish racial discrimination so as to justify federal court jurisdiction when white contractors alleged that if either one had been member of one of minority groups specified in affirmative action plan, proposal of their partnership would have been accepted. 42 U.S.C.A. § 1983.

4. Civil Rights ⇐ 13.8(1)

Affirmative action plan adopted by school district and school board, as entities, providing that, in order to be "responsible bidder" for purposes of California statute requiring school district to award to "lowest responsible bidder" any contract for work involving more than $12,000, general contractor bidding on school construction project over $100,000 must use minority-

owned businesses for at least 25% of dollar amount of total bid is justified by school district's interest in remedying lingering effect of past discrimination in school construction industry, and, therefore, does not violate equal protection clause. West's Ann.Cal. Educ.Code §39640; 42 U.S.C.A. §1983; U.S.C.A.Const.Amend. 14.

5. States ⇦ 4.1

Although state law may prevent political subdivision of state from performing selected functions, there is nothing in United States Constitution to specify how state must allocate internally the exercise of power that state itself is constitutionally authorized to perform.

6. Civil Rights ⇦ 13.8(1)

Even if United States Constitution limits manner in which various functions may be allocated within state, school district may have legitimate interest in attempting to remedy effects of past discrimination in one particular industry, such as school construction. West's Ann.Cal.Educ.Code § 39640; 42 U.S.C.A. § 1983; U.S.C.A.Const.Amend. 14.

7. Civil Rights ⇦ 13.13(3)

In action challenging validity of affirmative action plan applicable to general contractors to submit bids for construction contracts solicited by school district, school board's finding that nonminority-owned contracting firms had been unwilling to participate with minority-owned firms in school construction contracts was supported by substantial evidence. West's Ann.Cal.Educ.Code § 39640; 42 U.S.C.A. § 1983; U.S.C.A. Const.Amend. 14.

8. Civil Rights ⇦ 13.8(1)

For purposes of adopting affirmative action plan applicable to general contractors who submit bids for construction contracts solicited by school district, school board had technical competence to make finding that nonminority-owned contracting firms had been unwilling to participate with minority-owned firms in school construction contracts, since school board had ample experience in evaluating school construction bid proposals and in

analyzing operations of those firms whose bids it had considered. West's Ann.Cal.Educ.Code § 39640; 42 U.S.C.A. § 1983; U.S.C.A.Const.Amend. 14.

9. Civil Rights ⇦ 13.8(1)

It was appropriate for school board to be the body to assert interest in remedying effects of past discrimination in school construction industry when school board adopted affirmative action plan applicable to general contractors who submit bids for construction contracts solicited by school district in order to set example to children who it was responsible for educating. West's Ann.Cal.Educ.Code § 39640; 42 U.S.C.A. § 1983; U.S.C.A. Const.Amend. 14.

10. Civil Rights ⇦ 13.8(1)

Policy of school district providing that, in order to be "responsible bidder" for purposes of California statute requiring school district to award to "lowest responsible bidder" any contract for work involving more than $12,000, general contractor bidding on school construction project over $100,000 must be minority-owned businesses for at least 25% of dollar amount of total bid was sufficiently tailored to objective of remedying past discrimination in school construction industry where program did not result in awarding contracts to any bidder who did not otherwise satisfy statute, 25% figure was not unnecessarily high and plan was closer to one merely considering race as factor, rather than regime of strict racial quotas; therefore, affirmative action plan did not violate equal protection clause. West's Ann.Cal. Educ.Code § 39640; 42 U.S.C.A. § 1983; U.S.C.A.Const. Amend. 14.

11. Federal Courts ⇦ 757

In action challenging validity of affirmative action plan applicable to general contractors who submit bids for construction contracts solicited by school district, Court of Appeals would not decide state law issues of whether damages would be available for violation of section of California Education Code requiring school district to award to "lowest responsible bidder" any contract for work involving more than $12,000. West's Ann.Cal. Educ.Code § 39640.

Roger J. Marzulla, Matthews & Marzulla, San Jose, Cal., for plaintiffs-appellants.

Michales S. Sorgen, Oakland, Cal., for defendants-appellees.

Appeal from the United States District Court for the Northern District of California.

Before SKOPIL, FLETCHER and FARRIS, Circuit Judges.

FLETCHER, Circuit Judge:

At issue in this appeal is the validity of an affirmative action plan (AAP) applicable to general contractors who submit bids for construction contracts solicited by the Oakland Unified School District (School District). Under Cal.Educ.Code § 39640, a school district must award to the "lowest responsible bidder" any contract for work involving more than $12,000. The School District has adopted a policy providing that, in order to be a "responsible bidder" for purposes of the California statute, a general contractor bidding on a school construction project over $100,000 must use minority-owned businesses for at least twenty-five percent of the dollar amount of the total bid.[1] The requirement is subject to numerous discretionary exceptions, described below. A low bidder who is in apparent noncompliance with the AAP has the right to an individual hearing to contest the finding that it is not a responsible bidder.

The Oakland Board of Education (School Board) is the executive arm of the School District. In February 1977, the board solicited bids for the refurbishing of the Oak Grove Campus of Oakland Technical High School. The bid specifications required conformity with the AAP. Schmidt & Pollard, a partnership engaged in general contracting whose partners, Schmidt and Pollard, are both white, submitted the low bid of $160,280. Under the Schmidt & Pollard proposal, Jot Brown, Inc., a minority-owned company, as a subcontractor, would receive approximately sixteen percent of the total dollar amount. A joint venture owned

1. The AAP defines a minority person as one whose ancestry is black, Asian, Latin American, American Indian, or any native Pacific Island group.

sixty-five percent by Thomas, who is white, and thirty-five percent by Cottrell, who is black, submitted the next-lowest bid of $167,000.

Because Schmidt & Pollard was the low bidder but was in apparent noncompliance with the AAP, it was granted a hearing and found not to be a responsible bidder within the meaning of the statute. Schmidt and Pollard argued that they had taken every possible measure to obtain twenty-five percent minority participation, but that their efforts had been unavailing. Finding to the contrary, the Board awarded the contract to Thomas and Cottrell.

Schmidt & Pollard, and its partners individually, and Jot Brown, Inc. brought the present action against the School District, the School Board, and the seven individual members of the School Board. Alleging that the AAP violated the equal protection clause, plaintiffs claimed damages under 42 U.S.C. §§ 1981 and 1983. Plaintiffs alternatively claimed damages on the theory that the AAP violated Cal.Educ.Code § 39640, described above.[2]

The district court held that all the defendants were immune from damages for any actions taken in good faith, and that all the defendants had acted in good faith in adopting and implementing the AAP. Finding no genuine issue of material fact, the court granted summary judgment for the defendants. The plaintiffs appeal.

I
IMMUNITY

[1] In reviewing the propriety of the grant of summary judgment on immunity grounds, we distinguish the School District and the School Board from the individual members of the School Board. School board members are entitled to a qualified immunity from money damages in section 1983 actions, for actions taken in good faith. *Wood v. Strickland*, 420 U.S. 308, 95 S.Ct. 992, 43 L.Ed.2d 214 (1975). Thus, with respect to the

2. The complaint also alleged unspecified violations of the due process clause, the privileges and immunities clause, and various California constitutional and statutory provisions other than section 39640. Those claims are not argued on appeal.

individual board members, the question is whether there was a triable issue as to their good faith in adopting and implementing the AAP.

[2] We agree with the district court that there was not. The only evidence purportedly showing bad faith was an affidavit, by the plaintiffs' attorney relating statements made by two School Board members before adoption of the AAP. One of the members stated that the county counsel had predicted the AAP would be invalidated by the courts. Another member, supporting the plan, responded: "I don't let attorneys run my business. I let them advise me on how I should run it, but I make the decisions. And no attorney's going to tell me what I can and can't do...." The plaintiffs seek to infer that the School Board adopted the plan with knowledge that the plan was illegal.

The parties' joint pretrial statement, however, included a stipulation that, after the alleged statements by the two School Board members but before adoption of the AAP, the legal advisor to the School Board had made a contrary prediction. The legal advisor noted that a California Superior Court had refused to grant a preliminary injunction restraining implementation of the Oakland AAP, that the California Court of Appeal had affirmed, and that the California Supreme Court had declined review. He explained to the board members that the court's ruling reflected a conclusion that the plaintiffs in that litigation were unlikely to succeed on the merits, and that it could be inferred from the court's ruling that the AAP would probably be upheld.

The evidence before the district court shows at most that the School Board rejected the opinion of one attorney in favor of the subsequent opinion of its own attorney. The latter opinion was rendered in the light of an intervening development in the law. We are not persuaded that the showing made here is sufficient to create a triable issue as to the good faith of the individual board members. We therefore conclude that the district court properly granted summary judgment for the individual defendants.

The district court also held that the School Board and School District as entities were immune from damages for good faith acts. At the time of the district court's decision, the liability of a local government body under section 1983 was an open question. *See Monell v. Department of Social Services,* 436 U.S.

658, 701, 98 S.Ct. 2018, 2041, 56 L.Ed.2d 611 (1978) (local government bodies have no absolute immunity from damages under section 1983, but Court left open the question whether some lesser degree of immunity attaches). Shortly after the district court decision, the Supreme Court held that a local government body does *not* enjoy even a qualified immunity from liability under section 1983 for actions taken in good faith. *See Owen v. City of Independence*, 445 U.S. 622, 100 S.Ct. 1398, 63 L.Ed.2d 673 (1980).

The parties agree that, with respect to the governmental defendants, *Owen* has undercut the basis for the district court decision. The defendants argue, however, that there are two alternative grounds for affirming the grant of summary judgment: that the district court lacked subject matter jurisdiction, and that the plaintiffs have not demonstrated a right to relief. The remainder of this opinion, which relates only to the School District and School Board as defendants, addresses those contentions.

II

SUBJECT MATTER JURISDICTION

[3] The appellees argue that the summary judgment in their favor should be affirmed on the ground that the district court lacked jurisdiction. They maintain that no federal question was presented because the pleadings and supporting affidavits do not allege facts which, if true, would establish racial discrimination. Appellees' position appears to be that the bid submitted by Schmidt and Pollard was rejected not because the bidders themselves are not minorities, but because less than twenty-five percent of the dollar amount of their bid was targeted for minority-owned enterprises. Schmidt and Pollard, they argue, were therefore not discriminated against because of their race.

The appelees' contention borders on the frivolous. A white general contractor may meet the twenty-five percent requirement either by subcontracting to a minority-owned firm or, as was done here by Thomas, by entering into a joint venture with another general contractor that is minority-owned. If either Schmidt or Pollard had been a member of one of the minority groups specified in the AAP, the proposal of their partnership would have been accepted. It is specious, therefore, to argue that the plaintiffs

did not allege racial discrimination. Appelles' reliance on *Associated General Contractors v. San Francisco Unified School District*, 616 F.2d 1381 (9th Cir.), *cert. denied*, 449 U.S. 1061, 101 S.Ct. 783, 66 L.Ed.2d 603 (1980), is misplaced, for in that case the court expressly held that a similar complaint asserted a federal question. *See* 616 F.2d at 1384. That the court's ultimate disposition of a pendent state claim rendered resolution of the federal constitutional question unnecessary does not alter this result.

III

THE MERITS

We now confront the major issue presented by this appeal. The appellees argue, in effect, that the grant of summary judgment should be affirmed on the basis that, event if all the allegations of the complaint are true, the plaintiffs have no right to relief on the stated claims. With respect to the federal claim, the appellees argue that the AAP is constitutional. With respect to the state claim, the appellees maintain that California law does not permit money damages for the particular claims advanced here. We agree that the Oakland plan is constitutional, and decline to pass on the availability of money damages under state law.

A. *Constitutionality of Affirmative Action Plan.*

The question whether a so-called affirmative action plan violates equal protection was first addressed by the Supreme Court in *Regents of the University of California v. Bakke*, 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978). The challenge was to an admissions program adopted by the medical school of the University of California at Davis. Under that program, sixteen of the one hundred places in the entering class were specifically reserved for minority applicants. Bakke, a white male whose application had been rejected, alleged that he would have been

accepted but for the Davis AAP. He argued that the school had violated Title VI of the Civil Rights Act of 1964[3] and the equal protection clause.

Five Justices, concluding that an action violates Title VI only if a similar state action would violate equal protection, reached the constitutional question. *See Bakke*, 438 U.S. at 287, 98 S.Ct. at 2746 (Powell, J.), 328, 355, 98 S.Ct. 2767, 2781 (Brennan, White, Marshall and Blackmun, JJ.). As to the equal protection question, Justice Powell expressed the view that all racial classifications which exclude individuals from the enjoyment of some opportunity, including those classifications operating in favor of minorities call for strict scrutiny. *Id.* at 305, 98 S.Ct. at 2756. Applying that standard, he concluded that a state university has a compelling interest in attracting a diverse student body, but that the strict racial quota imposed by the Davis plan was not necessary to achievement of that goal. *Id.* at 314–19, 98 S.Ct. at 2760-63. He held, therefore, that the Davis program violated equal protection. *Id.* at 320, 98 S.Ct. at 2763. Justice Powell then stated, however, that in his view race may be considered as one factor in an admissions program aimed at achieving student diversity.[4]

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3. Pub.L. 88–352, Title VI, § 601 (July 2, 1964), 78 Stat. 252, 42 U.S.C. § 2000d, provides:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

4. The Justices disagreed as to the propriety of reaching this issue. Justice Powell, having concluded that race could be considered, stated that the "California court's judgment" must be reversed insofar as it enjoins the university from considering race as a factor in the future. *Bakke*, 438 U.S. at 320, 98 S.Ct. at 2763. Justice Stevens, dissenting argued that the only state court enjoining the university from considering race was the trial court, and that the trial court's decision had been superseded by that of the California Supreme Court, which contained no such injunction. Accordingly, he concluded that the issue should not be addressed. *Id.* at 408–11, 98 S.Ct. at 2808–10.

5. There is some uncertainty as to the view of Justice White on this question. Although he co-authored the opinion and wrote a separate opinion expressly reaffirming that the joint opinion reflected his views on equal protection, *see Bakke*, 438 U.S. at 387, 98 S.Ct. at 2797, he also joined Part III–A of Justice Powell's opinion. *See id.* at 387 n.7, 98 S.Ct. at 2797 n.7. In Part III–A, Justice

Justices Brennan, White, Marshall, and Blackmun joined in an opinion concurring and dissenting. On the equal protection question, they would have held that racial classifications designed to further remedial purposes were subject only to an intermediate level of scrutiny; *i.e.*, the classification must be substantially related to an important governmental interest. *Id.* at 359-62, 98 S.Ct. at 2783–85.[5] They found the Davis AAP substantially related to the important state interest in remedying the effects of past societal discrimination and, therefore, constitutional. *Id.* at 362, 369–79, 98 S.Ct. at 2784, 2788–94.

Justice Stevens, concurring and dissenting, was joined by the Chief Justice and by Justices Stewart and Rehnquist. The opinion by Justice Stevens concluded that the Davis AAP violates Title VI, and did not reach the equal protection issue. *Id.* at 411–12, 421, 98 S.Ct. 2809–10, 2815.

Thus, a majority of five Justices held that a state unviersity admissions program may not employ strict racial quotas, one of the five reaching that decision on constitutional grounds and the other four on statutory grounds. A separate majority of five Justices, however, held that a state university admissions program may take race into account as one factor. There was no majority on the issue of the standard of review.

In *Fullilove v. Klutznick*, 448 U.S. 448, 100 S.Ct. 2758, 65 L.Ed.2d 902 (1980), the Court addressed the constitutionality of the "minority business enterprise" provision of the federal Public Works Employment Act of 1977. *See* 42 U.S.C. § 6705(f)(2). Under that provision, no federal grant for a local public works project may be made without assurance by the applicant that at least ten percent of the amount of the grant will be expended for minority business enterprises. The statute and the implementing regulations allow for administrative waivers analogous to those embodied in the Oakland plan. *See Fullilove*, 448 U.S. at 468–72, 100 S.Ct. at 2769–72. An aggrieved white contractor argued that the statutory provision violated equal protection.

Powell concluded that strict scrutiny should apply. *Id.* at 287-91, 98 S.Ct. at 2746–49. The subsequent decision in *Fullilove v. Klutznick*, 448 U.S. 448, 100 S.Ct. 2758, 65 L.Ed.2d 902 (1980), does not dispel the uncertainty, because Justice White there joined the opinion of the Chief Justice, which did not specify a standard.

The Chief Justice, in an opinion joined by Justices White and Powell, found the plan constitutional. The opinion concluded that ending procurement practices that can perpetuate the effects of prior discrimination is a legitimate congressional objective. 448 U.S. at 478, 100 S.Ct. at 2774–75. The Chief Justice found it significant that the plan allowed for administrative waivers. *Id.* at 487–89, 100 S.Ct. at 2779–80. The standard of review was not explicitly stated,[6] but Justice Powell wrote separately to repeat his belief, expressed in *Bakke*, that strict scrutiny should be applied. *See id.* at 496, 100 S.Ct. at 2783. Justice Marshall; joined by Justices Brennan and Blackmun, concurred in the result but applied intermediate scrutiny. *Id.* at 518–19, 100 S.Ct. at 2795–96. Justice Stewart, joined by Justice Rehnquist, dissented, agreeing with Justice Powell that all racial classifications are suspect, *id.* at 523–27, 100 S.Ct. at 2798–2800, but rejecting Justice Powell's conclusion that the statute survives strict scrutiny. Justice Stevens, not specifying the standard of review, also dissented. *Id.* at 532–54, 100 S.Ct. at 2802–14.

With one important exception, the AAP upheld in *Fullilove* was identical in all pertinent respects to the Oakland plan. Both plans requried applicants for publicly sponsored construction contracts to provide assurances that a specified proportion of the contract amount would go to minority-owned enterprises.[7] Both plans provide for administrative waivers of the set-aside requirement in the discretion of the applicable governmental body.

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6. The opinion states that racial classification must be afforded "close examination." 448 U.S. at 472, 100 S.Ct. at 2771 *See also id.* at 491, 100 S.Ct. at 2781 ("most searching examination"). It also spoke, however, of according "great weight to the decisions of Congress." *Id.* at 472, 100 S.Ct. at 2772 (quoting *Columbia Broadcasting System, Inc. v. Democratic Nat'l Committee*, 412 U.S. 94, 102, 93 S.Ct. 2080, 2086, 36 L.Ed.2d 772 (1973)). The opinion further states that it does not adopt any of the analyses articulated in *Bakke*, and that the minority business enterprise provision would survive judicial review under either of the tests enunciated in *Bakke*. *Id.* at 492, 100 S.Ct. at 2781–82.

We note one reference to the "rational basis" test. *Id.* at 475, 100 S.Ct. at 2773. That reference, however, concerned the question whether the statute could be tied to the commerce clause, not whether the statute violated the equal protection clause.

7. We recognize that the present case involves a numerical goal of 25%, while the analogous figure in *Fullilove* was only 10%. For the reasons given in the text, *see infra* 662 F.2d at 559–560, that distinction does not affect the outcome of this case.

(The one crucial distinction between the two plans is that the program considered in *Fullilove* was mandated by Congress, whereas the AAP at issue here was adopted by a local school board. (The Chief Justice in *Fullilove* observed: "[h]ere we pass, not on a choice made by a single judge or a school board, but on a considered decision of the Congress and the President." *Id.* at 473, 100 S.Ct. at 2772.)

Although the intended import of that distinction is not entirely clear, the opinion at a later point alludes to section 5 of the fourteenth amendment, noting, *id.* at 476–77, 100 S.Ct. at 2773–74, that section 5 authorizes Congress to enact legislation aimed at eliminating the effects of past discrimination.[8] (Because section 5 was invoked to establish the legitimacy of the government interest asserted as a justification for the challenged statute, and because no comparable constitutional authority can be invoked by a local school board, we do not automatically extend the result in *Fullilove* to the present case.) Accordingly, the constitutionality of the Oakland plan must be discretely analyzed.

1. Objectives of Plan

[4] The policies that the Oakland School Board's affirmative action program is designed to promote are recited in the text of the plan. One objective is "to assure that the construction program of the Oakland Unified School District does not perpetuate the presently evidenced effects of past discrimination in the construction industry against minority-owned firms." The School Board's intent was "to overcome the unwillingness of the construction industry's non-minority-owned firms to participate in a significant way with minority-owned firms when contracting for school construction projects."[9]

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8. Section 5 of the fourteenth amendment empowers Congress to pass laws designed to effectuate the purposes of the fourteenth amendment; Congress is not limited to prohibiting activities that would be held by the courts to violate the fourteenth amendment. See *Oregon v. Mitchell*, 400 U.S. 112, 91 S.Ct. 260, 27 L.Ed.2d 272 (1970); *Katzenbach v. Morgan*, 384 U.S. 641, 86 S.Ct. 1717, 16 L.Ed.2d 828 (1966)

9. Because the text of the affirmative action plan contains an express statement of the School Board's intention to promote the interests that we now consider in this opinion, this is not a case in which an interest is asserted only as an afterthought. *See United States Railroad Retirement Board v. Fritz*, 449 U.S. 166, 101 S.Ct. 453, 464, 66 L.Ed.2d 368 (1980) (Brennan, J., dissenting).

As noted above, the Supreme Court has not yet decided the standard under which a benign racial classification is to be reviewed. We need not decide the applicable standard in this case because we find that, under any of the recognized equal protection standards, the Oakland plan is justified by the School District's interest in remedying the lingering effects of the past discrimination in the school construction industry.

There can be no doubt today as to the importance of the asserted objective. Five Justices in *Bakke* explicitly recognized the important state interest in ameliorating the disabling effects of identified discrimination. *See Bakke*, 438 U.S. at 307, 98 S.Ct. at 2757 (Powell, J.), 362 (Brennan, White, Marshall, and Blackmun, JJ.).[10] Moreover, the equal protection clause itself, although lacking a state counterpart to section 5, requires state officials to be cognizant of the need for racial equality. The prevalence of state constitutional provisions mandating equal protection demonstrates the states' own perceptions that they have strong interests in fostering racial equality. *See also North Carolina State Board of Education v. Swann*, 402 U.S. 43, 45, 91 S.Ct. 1284, 1285, 28 L.Ed.2d 586 (1971) (school district may conclude that, as matter of educational policy, racial balance desirable quite apart from constitutional requirements). *Cf. United Steelworkers of America v. Weber*, 443 U.S. 193, 99 S.Ct. 2721, 61 L.Ed.2d 480 (1979) (Civil Rights Act of 1964 not violated by private employers's affirmative action plan, where purpose was to open up employment opportunities in historically segregated job categories); *United Jewish Organizations v. Carey*, 430 U.S. 144, 97 S.Ct. 996, 51 L.Ed.2d 229 (1977) (upholding county apportionment plan structured to ensure that the percentage of districts in which there were non-white majorities would roughly approximate the percentage of non-whites in the county).

(The appellants argue, however, that regardless of whether a *state* has an important interest in remedying discriminatory effects, the *School District* does not. They argue that a political

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10. Justice Powell limited his conclusion to "identified" discrimination, which he regarded as more focused than general "societal" discrimination. *Bakkee*, 438 U.S. at 307, 98 S.Ct. at 2757. The other four Justices went farther, fining an important state [Sentence endings unreadable] remedying even societal discrimination 362, 98 S.Ct. at 362,

subdivision can assert such an interest only if it has made, and is competent to make, findings of identified discrimination. Although we do not share appellant's view on this point, there is some support for the argument in the opinion of Justice Powell in *Bakke*, 438 U.S. at 307–10, 98 S.Ct. at 2757–59, repeated in *Fullilove*, 448 U.S. at 516, 100 S.Ct. at 2794, although four other Justices have adopted a contrary position, *see Bakke*, 438 U.S. at 366–67 n.42, 98 S.Ct. at 2787 n.42 (Brennan, White, Marshall, and Blackmun, JJ., concurring and dissenting), and the remaining four Justices have not expressed a view on this question.

[5] We acknowledge that state law may prevent a political subdivision of a state from performing selected functions, *see Associated General Contractors v. San Francisco Unified School District*, 616 F.2d 1381 (9th Cir.), *cert. denied*, 449 U.S. 1061, 101 S.Ct. 783, 66 L.Ed.2d 603 (1980). However, we see nothing in the United States Constitution specifying how a state must allocate internally the exercise of a power that the state itself is constitutionally authorized to perform.

[6] Even assuming *arguendo* that the Constitution limits the manner in which various functions may be allocated within a state, we conclude that the limitations suggested by Justice Powell would not aid the appellants in this case. In reaching this conclusion, we stress that the asserted interest is not the general one of remedying past *societal* discrimination, an interest rejected by Justice Powell. *See note 10 supra*. We are dealing, rather, with a more focused attempt to remedy the effects of past discrimination in one particular industry, or, more accurately, in one particular sector of an industry—school construction contracts.

[7] Most importantly, the findings that Justice Powell would require (and that appelants urge are required) have been made in this case. According to the declaration submitted by school superintendent Ruth B. Love, non-white contractors complained that they had been excluded from participation in the bids of white general contractors. Numerous meetings were held between School District officials and construction industry representatives. These informal meetings were followed by public hearings, at which the allegation that non-white firms were excluded were repeated. The Oakland affirmative action plan, adopted after these meetings and public hearings, contained in its text the

School Board's finding that non-minority-owned contracting firms had been unwilling to participate with minority-owned firms in school construction contracts.

The School Board's findings are supported by the statistical disparity between the sizeable minority population of the community and the meager extent to which minority-owned enterprises have benefited from the award of school construction contracts. As of July 1, 1970, blacks alone constituted 34.5% of the Oakland city population. Bureau of Census, *Statistical Abstract of the United States,* Table 28 at 25 (81st ed. 1980). According to the delcaration of Superintendent Love, from 1947 until adoption of the affirmative action plan in 1975, the School Board awarded 135 construction contracts for amounts of at least $100,000 each. Of the 135, only one was awarded to a minority contractor, and only two were awarded to joint ventures in which there was participation by minority-owned firms. The disparity found by the School Board at the local level mirrors the disparity found by Congress nationally. *See Fullilove,* 448 U.S. at 459, 461, 463, 467, 478, 100 S.Ct. at 2765, 2766, 2767, 2769, 2774.

[8] It is equally clear that the School Board has the technical competence to make such findings. It has ample experience in evaluating school construction bid proposals, and in analyzing the operations of those firms whose bids it has considered.

[9] Finally, it is perfectly appropriate that the School Board be the body to assert an interest in remedying the effects of past discrimination in this particular industry. The School Board is charged with the vital responsibility of educating children. The declaration of Superintendent Love states that eighty-four percent of the students enrolled in the Scool District are non-white. For the School District to perpetuate the effects of past discrimination in school construction contract awards could seriously undermine its credibility in a community with so large a non-white population, thereby impairing its capacity to educate children. We see nothing improper in the Schoold District's laudable desire to set an example to the children whom it is responsible for educating. To the contrary, the AAP is highly relevant to the School District's mission.

2. Means Employed

[10] The next question, then, is whether the means chosen by the School District is sufficiently tailored to the objective of remedying past discrimination in the school construction industry. Several considerations are pertinent here.

First, the Oakland program does not result in the awarding of a contract to any bidder who does not otherwise satisfy the statutory requirements. The successful bidder must be found financially responsible, and its bid must be lower than that submitted by every other responsible bidder. Thus, as in *Bakke*, only those applicants who meet certain minimum standards can ultimately benefit from the program.

Second, the twenty-five percent figure adopted by the School Board is not unnecessarily high. The opinion of Justices Brennan, White, Marshall, and Blackmun, in *Bakke* stated approvingly that the minority percentage adopted by the University of California at Davis did not exceed the percentage of minorities in the California population. See *Bakke*, 438 U.S. at 374, n.58, 98 S.Ct. at 2791 n.58. A similar observation may be made here. As noted earlier, the Oakland population as of July 1, 1970, was more than 34.5% non-white. Thus, the twenty-five percent figure adopted does not seem excessive.

Finally, the Oakland plan is closer to one merely considering race as a factor, a scheme expressly approved by five Justices in *Bakke*, than to a regime of strict racial quotas. Like the federal statute upheld in *Fullilove*, the plan strongly encourages bidders to expend a specified percentage of the contract price on minority-owned contractors or subcontractors, but contains numerous exceptions that provide ample flexibility. The School Board has the discretion to award a contract to a bidder who has not met the twenty-five percent requirement if the contractor has taken every possible measure to comply, it is not practicable to demand compliance in the particular case, and it is in the best interests of the School District to award the contract. A second exception authorizes the School Board to depart from the twenty-five percent requirement when the contract consists primarily of work in highly specialized crafts for which there are insufficient minority participants. Third, the plan contemplates its own revision if the level of participation by minority-owned businesses decreases. This

feature makes it possible for the School Board to respond flexibly depending on the success of the program. Finally, the evidentiary hearing granted to any contractor whose low bid is rejected because of apparent noncompliance with the requirements of the plan further assures individualized treatment. Thus, as was stressed in *Fullilove*, the provisions for discretionary administrative waivers enhance the precision with which the plan fulfills the desired objective.

For the above reasons, we hold that the Oakland plan comports with equal protection regardless of which standard of review governs benign racial classification.

B. The State Claim.

[11] In *Associated General Contractors v. San Francisco Unified School District*, 616 F.2d 1381 (9th Cir.), *cert. denied*, 449 U.S. 1061, 101 S.Ct. 783, 66 L.Ed.2d 603 (1980), this court held that a San Francisco Unified School District policy very similar to the Oakland plan violated Cal.Educ.Code § 39640, which requires that school construction contracts awards be awarded to the "lowest responsible bidder." There are important distinctions between that case and the present one, however. The San Francisco School District had made no finding of past discrimination. 616 F.2d at 1385 n.4; *see also, Price v. Civil Service Commission*, 26 Cal.3d 257, 604 P.2d 1365, 161 Cal.Rptr. 475 (1980). It does not appear from the opinion whether administrative waivers were available. Furthermore, there is some indication here that the California courts would approve the Oakland plan. The Superior Court refused to grant a preliminary injunction to the Constructon Industry Council enjoining the plan's operation, and that decision was summarily affirmed by the Court of Appeal. Hearing was denied by the state Supreme Court. *See supra*, 662 F.2d at 554. *See also* 42 Cal.Op.Att'y Gen. 169 (1963) (school district may require inclusion of antidiscrimination clauses in school construction contracts). Finally, the plaintiffs in the *San Francisco* case sought only non-monetary relief. The plaintiffs here seek only money damages. As the appellants conceded at oral argument, there is a serious question whether, under California law, damages would be available for the violation of section 39640, if such a violation were ultimately found.

The appellees, citing *United Mine Workers of America v. Gibbs*, 383 U.S. 715, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966), argue that we ought not address this state law issue. We agree. The Court in *Gibbs*, noting the existence of pendent jurisdiction over related state law claims, stressed nonetheless that the power to assert pendent jurisdiction need not be exercised. *Id.* at 725-26, 86 S.Ct. at 1138-39. Considerations of comity enter into this determination. *Id.* at 726, 86 S.Ct. at 1139. The Court added, "Certainly, if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well." *Id.* (footnote omitted).

We think the prudent course in this case would be to refrain from deciding the state law issues. There has been no trial, and no significant time investment in the issue by either the district court or this court. The availability of money damages under state law, for action taken pursuant to an affirmative action plan allegedly violative of state law, is a highly sensitive issue. In the interests of comity, we choose to defer to the views of the California courts.

The judgment of the district Court is affirmed, with the reservation that the appellants remain free to pursue their state claims in the California courts.

AFFIRMED.

FARRIS, Circuit Judge, concurring:

I concur except for that portion of part III(B) of the opinion which discusses the merits of the state claim. The Supreme Court in *United States Mine Workers of America v. Gibbs*, 383 U.S. 715, 726, 86 S.Ct. 1130, 1139, 16 L.Ed.2d 218 (1966), held that the assertion of pendent jurisdiction is discretionary. Here the federal claim has been dismissed by summary judgment. We therfore properly decline to exercise pendent jurisdiction over the state claim. *See Wren v. Sletten Constr. Co.*, 654 F.2d 529, 536 (9th Cir. 1981); *Hodge v. Mountain State Tel. & Tel. Co.*, 555 F.2d 254, 261 (9th Cir. 1977); *Wham-O Mfg. Co. v. Paradise Mfg. Co.*, 327 F.2d 748, 753 (9th Cir. 1964).

I would leave to the California state courts the task of applying Cal.Educ.Code § 39640 and determining the relevance of *Associated General Contractors v. San Francisco Unified School District*, 616 F.2d 1381 (9th Cir.), *cert. denied*, 449 U.S. 1061,

101 S.Ct. 783, 66 L.Ed.2d 603 (1980). I question the propriety of making pronouncements on state law issues and precedent after properly deciding not to address the state law claim.

EXHIBIT B

United States District Court

NORTHERN DISTRICT OF CALIFORNIA

JOHANN SCHMIDT, *et al.*,
Plaintiffs,

C 77-1901 SAW

vs

ORDER

OAKLAND UNIFIED SCHOOL DISTRICT, *et al.*,
Defendants.

Both parties move for summary judgment on the issue of liability. The Court finds that, even if defendants' affirmative action plan was unconstitutional, defendants acted in good faith in adopting and implementing the plan. Therefore, defendant members of the School Board are immune from liability. *Wood v. Strickland*, 420 U.S. 308 (1975). This immunity extends to defendants School District and Board of Education as well. *Sala v. County of Suffolk*, 604 F.2d 207 (2d Cir. 1979); *Bertot v. School District No. 1*, __ F.2d __, 47 U.S.L.W. 2336 (10th Cir. 1978).

Accordingly, since there is no genuine issue as to any material fact and since defendants are entitled to judgment as a matter of law, Rule 56(c), Federal Rules of Civil Procedure,

IT IS HEREBY ORDERED that defendants' motion for summary judgment is granted.

IT IS FURTHER HEREBY ORDERED that plaintiffs' motion for summary judgment is denied.

IT IS FURTHER HEREBY ORDERED that plaintiff's state law claim is dismissed without prejudice.

Dated: December 10, 1979

_____

Judge

United States District Court

NORTHERN DISTRICT OF CALIFORNIA

JOHANN SCHMIDT, *et al.*,

Plaintiffs,

C 77-1901 SAW

vs

JUDGMENT

OAKLAND UNIFIED SCHOOL DISTRICT, *et al.*,

Defendants.

In accordance with the Order of December 10, 1979, IT IS ADJUDGED that this action is hereby dismissed.

Dated: December 10, 1979

_____

Judge

EXHIBIT C

OFFICE OF THE CLERK
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NOTICE OF ENTRY OF JUDGMENT

Judgment was entered in this case as of the file stamp date on the attached decision of the court.

Petition for Rehearing (FRAP 40)

A petition for rehearing may be filed within 14 days from the entry of judgment. A petition should not be filed in order to reargue the case but should only be filed to direct attention to material facts of law possibly overlooked in the decision. The 15 page limit allowed by the rule must be observed. In addition, 3 copies of the petition are required unless the petition includes a suggestion for rehearing en banc (in such instances 24 copies are required in addition to the original). The petition should of course be directed to the Clerk of the Court. A petition for rehearing must be submitted on 8½ x 11 inch paper, must show complete proof of service to all parties, and the original must contain an original signature of the counsel/pro per litigant submitting the petition.

Bill of Costs (FRAP 39)

See Rule 39 of FRAP for information as to which party is allowed costs on appeal. If a party is allowed costs, the bill of costs must be filed within 14 days from entry of judgment. Objections to the bill of costs by an adversary party must be filed within 7 days thereafter (see attached form).

Issuance of the Mandate (FRAP 41)

The mandate is the certified copy of the judgment. The mandate is scheduled to be issued 21 days from the entry of judgment unless the court directs otherwise. A *timely* petition for rehearing will stay the issuance of the mandate. If the petition is denied, the mandate will be entered 7 days later. A direct motion for stay of mandate must be filed in an original plus three copies.

Petition for Writ of Certiorari

For information concerning the filing of this petition, refer to the rules of the Supreme Court of the United States.

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EXHIBIT D

TO AFFIRMATIVE ACTION IN THE CONSTRUCTION PROGRAM

March 22, 1977

II. *Minority-owned Business Participation Policy*

A. *Policy and Purpose*

The policy of the Board of Education of the Oakland Unified School District in enacting this Affirmative Action Program and in setting forth goals therein, is as follows:

1. To guarantee the largest possible pool of qualified contracting firms will be available for the competitive bidding upon, and accomplishment of, Oakland Unified School District construction projects;

2. To assure that, corresponding with the availability of competitive minority-owned firms, such minority-owned firms have a fair and equal opportunity to compete for Oakland school construction jobs on the same terms as non-minority-owned firms;

3. To overcome the unwillingness of the construction industry's non-minority-owned firms to participate in a significant way with minority-owned firms when contracting for school construction projects, and to encourage joint participation as an integral part of the District's school construction program without regard to race, color, creed or national origin;

4. To assure that the construction program of the Oakland Unified School District does not perpetuate the presently evidenced effects of past discrimination in the construction industry against minority-owned firms.

B. *Affirmative Action*

In order to comply with the Education Code requirement to be a "responsible bidder," all general contractors bidding on school construction projects over $100,000 shall under this program use minority-owned businesses for individual contract dollar amounts which total at least 25% of the general contract dollar bid. A general contractor who submits a low bid under this program which does not meet this dollar amount, will be afforded an opportunity for a hearing as provided in paragraph C *infra*.

C. *Definitions*

1. "Ownership" will be determined according to the general legal definition of that term. The ownership of a thing is the right of one or more persons to possess and use the thing to the exclusion of others. In the use of a business, the elements of control and liability for one's actions are essential to the definition for purpose of this policy. The following guidelines will govern consideration of particular types of business formations:

    a. *Partnerships:* Partners are owners of the business and "all partners have equal rights in the management and conduct of the partnership's business." (Corp. Code §15018(e))

    b. *Joint Ventures:* The resemblance between a partnership and a joint venture is so close that the rights as between adventurers are governed practically by the same rules that govern partners. However, each joint venture agreement will be examined to assure that the intent and purpose of this program is not subverted by the joint venture agreement.

    c. *Limited Partnership:* The purpose of this program is to impose a legally enforceable

obligation upon the person exercising ownership control of a business, and since limited partners do not take part in control of the business, and are not bound by the obligations of the partnership (Corp. Code §15501), limited partners are not considered "owners" of the business for purposes of this program.

d. *Corporation:* A corporation is a legal person or entity recognized as having an existence separate from that of its shareholders. The corporation, itself, is the "business owner," and for purposes of this program, a corporate business will be considered to be a minority business if 50% or more of the shares of its voting stock are held by minority persons.

2. "Minority ownership" will be calculated as a percentage in direct proportion to the ownership interest the minority person or persons have in the business.

3. The term "minority" is defined so as to carry out the above-stated purposes of this program and to assure equal business opportunities for those persons historically excluded from or denied such opportunities because of the social practices and racial views of the majority in this country as a whole. For purposes of this program, a minority person is one whose identity or ancestry is one of the following: Black, Asian, Latin American, American Indian or any native Pacific Island group.

D. *Pre-bid Conference*

Within seven (7) days prior to opening bids, the District shall hold a pre-bid conference for contractors and subcontractors intending to prepare bids on a given project. The District shall explain the goals of the minority-owned business participation policy and shall

make available a listing of known minority-owned contractors, subcontractors, suppliers, and prefabricators who have indicated an interest in participating in the school construction program.

E. *Reporting Requirements*

Within five (5) working days after bids are received, the contractor shall provide a report of responses, proposals, and bids, including the dollar amount, received from minority-owned firms and non-minority-owned firms. This report shall indicate the action taken by the general contractor in response to the proposals and/or bids received from minority-owned firms and/or joint ventures between minority-owned firms and non-minority-owned firms. In cases where proposals and/or bids have been rejected by the general contractor, the reasons for rejecting the proposals and/or bids shall be indicated. This information shall be certified by a principal of the firm.

Also, within five (5) working days after bids are received, all minority-owned businesses that bid shall be required to submit to the Affirmative Action Officer the dollar amount of their bid and the names of all general contractors to whom they submitted bids. This information shall be certified by a principal of the firm.

F. *Inspection of Records*

For the purpose of determining compliance with this section, a contractor shall permit the District to inspect his books, records, and accounts as they may relate to minority-owned business participation, and shall respond to any questions which District staff may have with regard to the bid. The District may determine that a contractor is not responsible where the contractor refuses to permit such inspection or to answer such questions during his normal business hours.

G. *Determination of the Lowest Responsible Bidder, Notice and Hearing.*

The District shall designate as the apparent lowest responsible bidder the bidder who submits the lowest

monetary bid which complies with the provisions of paragraph B. In the event there are lower monetary bidders in apparent noncompliance with the provisions of paragraph B, such bidders shall be notified in writing of (1) their right to a hearing before the Board of Education; (2) the time and date of said hearing and (3) their right to present evidence and argument in their own behalf which they believe rebuts any finding of non-responsibility. The apparent lowest responsible bidder shall also be notified in writing of the time and date of the hearing and shall, at the hearing, be afforded an opportunity to present evidence and argument as to why he should be awarded the contract.

H. *Discretion of the Board*

Following the hearing, the Board of Education shall award the contract to the contractor which it determines is the lowest responsible bidder. The Board may award the contract notwithstanding noncompliance with its Affirmative Action Policy only where it finds that the contractor has taken every possible measure to comply, that it is not practicable to demand compliance in the particular case, and that it is in the best interests of the school district to award the contract.

I. *Specialized Craft Areas*

In certain highly specialized craft areas, such as intrusion alarm installation and structural steel work, there may not be sufficient minority contractors or subcontractors to participate at the levels specified in this policy. In the case of those contracts that are primarily comprised of work in specialized areas such as these, the Board at its discretion may determine not to require the provisions of this policy as a part of the contract specifications.

J. *Contract*

Upon acceptance of a bid by the Oakland Unified School District, this Affirmative Action Policy shall be considered a part of the contract. Consent by the Board to any substitution will be contingent upon the general

contractor's demonstrated efforts to maintain the minimum level of minority-owned business participation throughout the term of the contract.

K. *Minority-owned Business Participation Requirements*

Minority-owned businesses are expected to participate in the bidding process at least at the present level. In the event that the level of participation decreases, the District will make such changes in the policy as are necessary for the discharge of its primary responsibility for providing school facilities within current time and budget restrictions.

EXHIBIT E

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United States District Court

NORTHERN DISTRICT OF CALIFORNIA

JOHANN SCHMIDT and
LELAND POLLARD
individually and doing business as
SCHMIDT & POLLARD, a
partnership, *et al.*,

Plaintiffs,

vs

OAKLAND UNIFIED SCHOOL
DISTRICT, *et al.*,

Defendants.

CIVIL NO. C-77-1901 SAW
JOINT PRE-TRIAL
STATEMENT

Plaintiffs and defendants submit the following joint pre-trial statement pursuant to Local Rule 235-7.

A. *Parties.* This statement is submitted on behalf of all parties as a joint pre-trial statement.

B. *Jurisdiction and Venue.* Federal jurisdiction is based upon 28 U.S.C. § 1343, 42 U.S.C. §§ 1981 and 1983, 28 U.S.C.

§ 1331, and the Fifth and Fourteen Amendments to the Federal Constitution. Plaintiffs also assert a pendent claim under Cal. Ed. Code § 39640.

Defendants admit jurisdiction of the Federal causes of action.

C. *Substance of the Action.* The Oakland Unified School District solicited bids for refurbishing of one of its schools. Two bids were submitted: plaintiffs bid $160,380 and the only other bidder, Thomas & Cotrell, bid $167,000, Plaintiffs were denied the contract, and it was awarded to Thomas & Cotrell, a 75%-25% joint venture between a white contractor and a black contractor. The reason given for the denial was that plaintiffs' bid failed to meet specifications, viz, a minority business participation policy previously adopted by the District which required that 25% of the total dollar amount of any construction contract award go to minority suppliers, sub-contractors, or contractors.

D. *Undisputed Facts.* The following facts are undisputed by the parties:

1. In December 1975, the Board of Education revised the affirmative action policy for construction. The basic revision was to establish a procedure requiring general contractors to utilize the services of minority owned contractors or sub-contractors for no less than 25% of the total dollar amount of any contruction contract in order to be considered a "responsible" bidder.

2. One result of the revised affirmative action policy was to increase the volume of minority business participation. Between December 1975 and March 1977, minority business participation was 33.4% of the total dollar volume of $12,877,014 in 17 construction projects.

3. On March 29, 1977, the Board again revised the affirmative action plan. The revision included a hearing procedure for low monetary bidders whose bids appeared not to conform to specifications. It also clarified standards for the exercise of Board discretion to award a contract to a non-complying low monetary bidder who proved that he/she had made all reasonable efforts to comply with the minority

participation requirements, that compliance was not practicable under the circumstances, and that it would be in the best interest of the District to award the contract to the low bidder.

4. In February 1977, the District advertised for bids on refurbishing the Grove Street Campus of Oakland Technical High School (hereinafter "Grove St. job".)

5. Included in the bid specifications for the Grove St. job was the affirmative action policy adopted by the Board in 1975 (hereinafter AAP/75.)

6. On March 15, 1977, the firm of Schmidt & Pollard submitted a bid of $160,380 and Thomas & Cotrell, a joint venture, submitted a bid of $167,000 for the Grove St. job. Schmidt & Pollard's bid included 16.1% minority subcontractor participation, representing a total dollar volume of $25,885. Minority contractor participation in Thomas & Cotrell's bid was 25.5%, representing a total dollar volume of $42,502 achieved by means of a joint venture (between Thomas, a white contractor, and Cottrell, a black contractor.) These two were the only bids the District received for this job.

7. The Board conducted hearings on April 5 and 13, 1977, to give Schmidt & Pollard an opportunity to explain why they should be considered the lowest responsible bidder and be awarded the contract for the Grove Street job.

8. At the hearing, Johann Schmidt of Schmidt & Pollard, contended that his firm had made every reasonable effort to obtain sub bids by minority contractors but were unsuccessful in obtaining 25%.

9. John Cottrell and Bruce Fisher, representing Thomas & Cottrell, addressed the Board and contended that since they met the requirements of the specifications through their joint venture, they were the low responsible bidder and should be awarded the contract.

10. The Board discussed that a petition for a writ of mandate against the enforcement of the AAP/75 sought by the CIC against the OUSD had been denied by the Superior

Court and the Court of Appeal. The California Supreme Court refused to hear an appeal of these rulings. Moreover, the Superior Court had subsequently refused to enjoin operation of the policy. The Legal Adviser informed the Board that such rulings indicated that in the Court's opinion CIC had not shown a likelihood to prevail on the merits of the case and it could be inferred from such rulings that the Court would uphold the AAP/75.

11. After the hearings and the further discussion, the Board made a discretionary determination that Thomas & Cottrell had submitted the lowest responsible bid and awarded the contract for the Grove St. job.

12. In awarding the contract Thomas & Cottrell, the individual Board members acted within the scope of their authority.

13. Mr. Schmidt, Mr. Pollard, and Mr. Thomas are white. Mr. Cottrell is black. Jot Brown, Inc., subcontractor on the Schmidt & Pollard bid and plaintiff herein, is 50% owned by a Mexican-American.

14. The bid of Thomas & Cottrell contained no minority subcontractor participation.

15. Schmidt and Pollard had made every reasonable effort to obtain minority subcontractor bids for this project and were unable to do so.

16. Plaintiffs were competent contractors and were responsible in all respects, other than their failure to conform to the 25% minority participation requirement of the bid specifications.

E. *Disputed Factual Issues.* Defendant asserts the following issues of fact which are disputed by plaintiffs as to accuracy and/or relevancy:

1. Prior to 1970, the Oakland Public Schools awarded no contracts for school construction jobs to nonwhite general contractors. Between 1970 and July 1974, the OPS awarded only one major contract for school construction jobs exceeding $100,000 to a minority general contractor.

2. Prior to July 1974, fewer than 1% of the subcontractors on OPS construction jobs were minority.

3. Some possible explanations for the lack of minority bidders are the expense involved in preparing a bid when there is almost no likelihood of success, the fact that general contractors often required minority subcontractors to obtain bonding where white subcontractors were not so required, discriminatory bonding charges for minorities and racial discrimination against minorities who were less established in the trade and consequently whose skills and abilities were not known to white general contractors.

4. On July 23, 1974, the Board of Education adopted an affirmative action policy designed to increase the minority work force and business participation in school construction projects, based upon the good faith efforts of the construction industry.

5. During the period from July 1974, when the first minority business participation policy was adopted, to December 1975, when the 25% minority business participation responsibility requirement was instituted, the percentage dollar volume of all minority contractor participation increased to about 16.5% of the approximate total $13,000,000.00 awarded in 12 school construction contracts. However, there was no way for the Board to enforce the non-discrimination provision of the July 1974 policy on specific contract awards because that policy necessarily depended for its implementation solely upon the "good faith efforts" of the contractors themselves. This defect was highlighted by the Stonehurst School Project where the successful general contractor included minority contractor participation for only 2.5% of the total $1,788,303.00 contract amount. Significant community displeasure resulted from the award of this contract and the ensuing unrest further perpetuated racial enmity in the School District. A picket line of citizens who opposed the nearly complete exclusion of minority contractor participation on the Stonehurst School Project also forced a shut down of all construction at the project site for a time.

6. Bids from minority contractors and subcontractors were within a 5% range of the cost median during the period July 1974 to December 1975.

7. In December 1975, the Board of Education revised the affirmative action policy for construction (see undisputed facts #1.) One result of the School District's revised policy was to increase the volume of minority business participation. Between December 1975 and March 1977, minority business participation was 33.4% of a total dollar volume of $12,877,014 in 17 construction projects.

8. Prior to adopting the 1977 policy revisions, the Board conducted a public hearing on the proposals. Speakers included attorneys representing Minority Contractors Association of Northern California, representatives from Construction Industry Council and Associated General Contractors, and minority contractors themselves.

9. At the April 13, 1977, hearing on the Grove Street bid, the Legal Adviser told the Board that it had the discretion to award the contract to a bidder who did not comply with the AAP/75 requirement. He pointed out that the Board should consider the fact that one bidder met the 25% requirement as part of the Board's overall consideration as to whether it was substantially impractical to meet that requirement.

10. In adopting the affirmative action policy and in awarding the contract for the Grove Street job to Thomas & Cottrell, the Board acted in good faith in light of all the circumstances.

Plaintiffs raised the following factual issues which are disputed by defendant:

11. Amount of damages suffered by plaintiffs included lost profits on the contract, destruction of plaintiffs' business, attorney's fees, treble damages pursuant to California Civil Code § 52a, and other compensatory damages.

12. The individual Board members had specific intent to unlawfully discriminate against plaintiffs on the basis of race.

F. *Relief Prayed.* Plaintiffs claim the following damages:

1. Lost income which would have been derived by Schmidt and Pollard under the contract:

Labor of John Schmidt and Lee Pollard	$19,510
Supervision of contract	3,000
Overhead	3,000
General cleanup	150
Profit	7,606
Profit of Jot Brown	381
TOTAL	$33,647

2. General damages including damages for destruction of plaintiffs' contracting business (amount uncertain at this time) — $50,000 to $100,000.

3. Attorney's fees in a reasonable amount.

4. Treble the actual damages suffered pursuant to Calif. Civ. Code § 52a.

5. General damages for embarrassment, humiliation and anxiety in the sum of $10,000 each to plaintiffs Schmidt and Pollard.

G. *Disputed Points of Law.* In lieu of including statutes and decisions relied upon, both sides will file motions for summary of judgment with fully briefed points and authorities.

1. Did the affirmative action policy of the Oakland Unified School District as applied in this contract award violate the constitutional or civil rights of plaintiffs?

2. Are the individual defendants immune from liability under Federal law because they exercised their discretion and otherwise acted in good faith in light of all the circumstances?

3. Does the good faith defense apply to the School District?

4. If defendants are liable under federal law, what is the proper measure of damages?

5. If defendants are immune from liability under the Civil Rights Act, should the court exercise jurisdiction over pendent state claims?

6. Are the defendants liable for money damages for alleged violations of state law?

7. If any liability exists under state law for misaward of a contract by a public agency, what is the proper measure of damages?

8. Does Jot Brown, Inc. have standing to sue?

H. *Previous Motions.* Defendants made a motion to dismiss which was denied.

I. *Witnesses to be Called.* Johann Schmidt, Leland Pollard, Jot Brown, David S. Tucker, Jr., Melvin J. Caughell, Charles W. Goady, Barney E. Hilburn, Lorenzo N. Hoopes, Seymour M. Rose, Peggy Stinnett, Wesley Thomas, John Cottrell, Ray Dones, Sr., Ben Miller, Superintendent Ruth B. Love.

Expert witnesses regarding the value of the Schmidt & Pollard business (as yet unknown.)

J. *Exhibits, Schedules and Summaries.*

1. Documents and exhibits and text of various affirmative action policies of Oakland Unified School District;

2. Bid of Schmidt & Pollard;

3. Bid of Thomas & Cottrell;

4. Transcripts and minutes of School District Board hearings (including taperecordings) for the following dates: June and July 1974, December 1975, March and April, 1977.

K. *Further Discovery and Motions.* Both sides contemplate motions for summary judgment on the liability issue.

Discovery is complete except for the possible continuations of the depositions of Mr. Sorgen and Mr. May.

L. *Stipulations.* The parties stipulate as to the authenticity of the transcripts of the school board meetings of April 5 and 13, 1977, heretofore completed.

M. *Amendments, Dismissals, et al.* There are no anticipated amendments or dismissals.

N. *Settlement Discussions.* The parties have conducted settlement negotiations which have been unfruitful. It appears unlikely that the case will settle.

O. *Agreed Statement.* Not applicable.

P. *Bifurcation, Separate Trial of Issues.* Not applicable.

Q. *Reference to Master.* Not applicable.

R. *Appointment and Limitation of Experts.* Not applicable.

S. *Trial Date.* The court has already established a trial date of September 11, 1978.

T. *Estimate of Trial Time.* The parties estimate that the case will take approximately four days to try.

U. *Claims of Privilege or Work Product.* Not applicable.

V. *Miscellaneous.* Not applicable.

DATED: June 26, 1978.

BENJAMIN D. JAMES
CHARLES O. TRIEBEL, JR.
MICHAEL S. SORGEN
SANDRA WOLIVER

BY: _____
SANDRA WOLIVER,
Assistant Legal Adviser

DATED: June , 1978.

_____
ROGER J. MARZULLA, ESQ.

Opposition

Supreme Court, U.S.
FILED
APR 5 1982
ALEXANDER L. STEVAS
CLERK

No. 81-1444

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1981

JOHANN SCHMIDT and LELAND POLLARD, individually and doing business as Schmidt & Pollard, a California partnership,
Petitioners,

vs.

OAKLAND UNIFIED SCHOOL DISTRICT, et al.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

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QUESTIONS PRESENTED

1. Is it appropriate for a public school board to voluntarily adopt an affirmative action policy designed to remedy past discrimination in its school construction contracts?

2. Is a school district's affirmative action policy constitutionally valid when it merely considers race as a factor, excludes no group from participation in school construction programs, and requires the school board to make a discretionary, individualized determination following fair procedures?

3. Did the Federal Court of Appeals properly exercise its discretion to decline pendent jurisdiction where complicated issues of state law regarding liability had not been addressed by the state courts?

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No. 81-1444

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

JOHANN SCHMIDT AND LELAND POLLARD, individually and doing business as Schmidt & Pollard, a California partnership,

Petitioners,

v.

OAKLAND UNIFIED SCHOOL DISTRICT, et al.,

Respondents.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit (Petition, Exhibit A) is reported at 662 F.2d 550 (9th Cir. 1981). The Order of the United States District Court for the Northern District of California

(Petition, Exhibit B) is unreported.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

The constitutional provisions, statutes and rules involved are set forth in the Petition.

STATEMENT OF THE CASE

This case involves a challenge by a white general contracting firm to the affirmative action plan (AAP)(Petition, Exhibit D) governing the solicitation of bids and the award of construction contracts by the Oakland Unified School District (School District).

State law requires that the School District award to the "lowest responsible bidder" any contract for work involving more than $12,000. California Ed. Code, Section 39640. In December, 1975, in order to remedy the effects of

past discrimination in its school construction program, the School District adopted a policy that in order to be a "responsible bidder" a general contractor bidding on a school construction project over $100,000 must utilize the services of minority owned contractors or sub-contractors for no less than 25% of the dollar amount of the total bid. In March, 1977, following public hearings and meetings with interested parties (including amicii) the School Board revised its AAP to establish explicit hearing procedures for low monetary bidders whose bids did not appear to conform to the specifications describing responsibility. The revised AAP also clarified standards for the exercise of Board discretion to award a contract to a non-complying low monetary bidder who proved that all reasonable efforts to meet the minority participation requirements had been taken,

that compliance was not practicable under the circumstances, and that it would be in the best interests of the School District to award the contract to the low bidder. (See Undisputed Fact No. 3, Petition, Exhibit E.)

Pursuant to its responsibility to construct earthquake safe school buildings the School District advertised for bids on the Grove Street Campus of Oakland Technical High School in February, 1977. The bid specifications required conformity with the AAP. The bid of Thomas and Cottrell achieved minority contractor participation of $42,502.00 or 25.5% of the total $167,000.00 bid. This was accomplished by 65/35 joint venture for the work between Thomas, a white contractor, and Cottrell, a black contractor. The bid of petitioner Schmidt and Pollard included minority contractor participation of $25,885 or 16.1% of the total $160,000.00

bid. (Undisputed Fact No. 6, Petition, Exhibit E.)

Because Schmidt and Pollard was the low bidder, but was in apparent non-compliance with the AAP, the School Board conducted hearings on April 5 and 13, 1977, to give the firm an opportunity to explain why it should be awarded the contract for the Grove Street job. (Undisputed Fact No. 7, Petition, Exhibit E.)

At the hearing, Johann Schmidt contended that his firm had made every reasonable effort to obtain sub-bids by minority contractors but was unsuccessful in obtaining the required percentage. John Cottrell and Bruce Fisher, representing Thomas and Cottrell, also addressed the Board and contended that since they met the requirements of the AAP through their joint venture, they were the low responsible bidder and should be awarded the contract. Considering the fact that one

bidder met the specifications for 25% minority participation, the School Board found under the circumstances that it was practicable to meet the requirement of the AAP and awarded the contract to Thomas and Cottrell. (Undisputed Facts Nos. 8-11, Petition, Exhibit E.)

On August 25, 1977, Schmidt and Pollard brought the present action against the School District, the School Board, and the 7 individual members of the School Board, in the United States District Court for the Northern District of Califcrnia alleging violation of their civil rights. Plaintiffs (henceforward "petitioner") contended that they were deprived of the construction contract solely on the basis of their race.[1/]

1/ Petitioner asserts, without reference to the record, that if either partner, Schmidt or Pollard, had been non-white, the firm would have qualified under the 25% minority business requirement of the AAP. This assertion is unfounded. Only general contractors submit bids to the

On cross motions for summary judgment, the District Court found that the defendants had acted in good faith in adopting and implementing the AAP. Finding no genuine issue of material fact, the Court granted summary judgment for the defendants and petitioner appealed to the Ninth Circuit.

Noting that the School Board

School District and they routinely subcontract out much of the work making up the bid. General contracting firms may, but do not necessarily, perform some of the contract, depending upon the firm's qualifications and ability to do so. The portion performed by a general contractor may or may not be more than 25% of the total contract amount of a particular job. Thus, a minority owned general contractor could bid for a contract with the School District and not meet the AAP 25% requirement. It is not the race of the general contractor which determines the qualification under the AAP but the dollar amount of the contract that goes to the minority firms. Thomas and Cottrell met the AAP requirement by bidding as a joint venture and tailoring this venture to assure the proportion of the contract performed by a minority firm would exceed 25%. Such cooperation was encouraged by the AAP. (See Purpose No. 3 of the AAP, Petition, Exhibit D.)

had solicited legal advice and had thoroughly considered its successful defense of the AAP during protracted litigation in the State Courts, the Court of Appeals reaffirmed the finding of good faith on the part of the individual School Board members. However, during the pendency of the appeal, this Court held that a local governmental entity does not enjoy even a qualified immunity from liability under 42 U.S.C., Section 1983 for actions taken in good faith. See Owen v. City of Independence, 445 U.S. 622, 63 L.Ed.2d 673 (1980). Thus, with respect to the School District, Owen undercut the basis for the District Court's decision. Hence, the Ninth Circuit was squarely confronted with the Federal Constitutional claim. It found the Oakland AAP constitutional and declined to pass on the availability of money damages under state law. Petitioner now seeks a Writ of Certiorari.

REASONS FOR DENYING THE WRIT

I

AFFIRMATIVE ACTION IS NECESSARY TO ACHIEVE REAL EQUALITY

The road to equal opportunity is still beset with many obstacles which we are unlikely to overcome merely by the prohibition of present and future discrimination. As Justice Blackmun stated in Regents of the University of California v. Bakke, 438 U.S. 265 at 407, 57 L.Ed.2d 750, (1978), "In order to get beyond racism, we must first take account of race. There is no other way." Or as the United States Commission on Civil Rights observed:

> "If we do not lose our nerve and commitment and if we call upon the reservior of good will that exists in this nation, affirmative action programs will help us reach the day when our society is truly color blind... ."

Statement on Affirmative Action, page 12, (1977).

The Nation's early perceptions arose in the school desegregation cases where this Country firmly and repeatedly repudiated the notion that the Constitution requires governmental action in a wholly "color blind" fashion. In Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 at 18-21, 28 L.Ed.2d 554 (1971), this Court concluded that the racial composition of student bodies was an unavoidable starting point and that racially based attendance assignments were permissible so long as no absolute racial balance was required in each school. In McDaniel v. Barresi, 402 U.S. 39, 41, 28 L.Ed.2d 582 (1971) this Court reaffirmed that the remedial process invariably requires that students be assigned "differently because of their race" and that any other approach would "freeze the status quo". In order to facilitate implementation of desegregation plans, the Court stated in North Carolina

Board of Education v. Swann, 402 U.S. 43 at 46, 28 L.Ed.2d 586 (1971),

> "Just as the race of students must be considered in determining whether a constitutional violation has occurred, so also must race be considered in formulating a remedy."

But the authority of the courts to consider race in formulating remedies for unconstitutional racial discrimination is not restricted to school desegregation. Franks v. Bowman Transportation Co., 424 U.S. 747, 47 L.Ed.2d 444 (1976), International Brotherhood of Teamsters v. United States, 431 U.S. 324, 52 L.Ed.2d 396 (1977), Albemarle Paper Co. v. Moody, 422 U.S. 405, 43 L.Ed.2d 280 (1975). Indeed, this Court has authorized governmental use of racial criteria when reasonably necessary to assure compliance with federal voting rights legislation even though the governmental action did not entail the remedy of a constitutional

violation. United Jewish Organizations of Williamsburgh Inc. v. Carey, 430 U.S. 144 at 147 - 165, 51 L.Ed.2d 299 (1977).

In all, 7 members of the present Supreme Court have recently sustained affirmative action in some circumstances. Fullilove v. Klutznick, 448 U.S. 448, 65 L.Ed.2d 902 (1980); Regents of the University of California v. Bakke, supra; United Steel Workers v. Weber, 443 U.S. 193, 61 L.Ed.2d 480 (1979). (The votes are counted in each of the three cases cited above in Setser v. Novack Investment Co., 657 F.2d 962, 965 - 966 (8th Cir. en banc 1981).) Two questions of central importance are addressed in this Supreme Court triolgy:

(1) When is it permissible to initiate affirmative action plans?

(2) What methods may be employed?

II

THIS COURT HAS ADEQUATELY CLARIFIED GUIDELINES FOR VALID AFFIRMATIVE ACTION PLANS

A. Affirmative Action is a Proper Remedy for Past Discrimination.

In Bakke, Justices Brennan, White, Marshall and Blackmun concluded that the need to counteract effects of past societal discrimination serves important governmental interests which justify use of a race conscious admissions program at the State University's Medical School. Justice Powell differed on the standard for judicial review but indicated that ameliorating or eliminating the disabling effects of identified discrimination could constitute a compelling state interest. While the Court prohibited the use of strict racial quotas, a majority of five justices held that a state university could take race into account as one factor in its admissions program.

In Weber this Court ratified a race conscious affirmative action plan by a private employer holding that it is permissible to consider race when designed to remedy a "conspicuous racial imbalance in traditionally segregated job categories." 433 U.S. at 209. The burden on the employer in a reverse discrimination suit is to show that the AAP is responsive to some identified racial imbalance in the work force and thereby to insure that new forms of invidious discrimination are not approved in the guise of remedial affirmative action.

In Fullilove, a case closely analogous to the one at bar, the Court addressed the claim of an aggrieved white contractor that the "minority business enterprise" provision of the Federal Public Works Employment Act of 1977, 42 U.S.C., Section 6705 (f)(2), violated equal protection. Chief Justice Burger, in an opinion joined by Justices White and Powell,

concluded that Congress could enact the program in order to avoid perpetuating the effects of prior discrimination. The Chief Justice stressed the remedial purposes:

> "The Congress has not sought to give select minority groups a preferred standing in the construction industry but has embarked on a remedial program to place them on a more equitable footing with respect to public construction opportunities." 448 U.S. at 472, 65 L.Ed.2d at 929.

Although the standard of review was not explicitly stated, the opinion assures that the legislation was subjected to the rigor of a "most searching examination" and that it would survive judicial review under either of the tests ennuciated in Bakke. Id. at 491-492.

Justice Powell wrote separately to reiterate his view expressed in Bakke that strict scrutiny should be applied, Id. at 496, and concluded that redressing identified discrimination against minority

contractors was a compelling governmental interest. Id. at 515. Justices Marshall, Brennan and Blackmun concurred in the result but applying intermediate scrutiny concluded that remedying the present effects of past discrimi ation served important govenmental objectives. Id. at 518-521.

The statute and implementing regulations sustained in Fullilove closely resemble the Oakland AAP. Both plans require that applicants for publicly sponsored construction contracts insure a specified proportion of the contract amount will go to minority owned enterprises. Both plans provide for administrative waivers of the requirement in the discretion of the applicable governmental body.

As the Court of Appeals recognizes, the Oakland AAP recites in its text the objectives which it was designed to accomplish and leaves no doubt as to its remedial purpose. (See Petition,

Exhibit A, pp. 13 and 14.) The AAP's policy goals and purposes are set forth in the Petition, Exhibit D, p. D-1. Hence, there can be no dispute that the Oakland plan is surely remedial and meets that central requirement for valid voluntary affirmative action.

B. It is Appropriate for a Public School District to Enact an Affirmative Action Plan.

The Chief Justice observed in Fullilove:

> "Here we pass not on a choice made by a single judge or School Board, but on a considered decision of the Congress and the President." 448 U.S. at 473.

At least three separate times in the petition (pp. 7, 11 and 18), this single sentence is invoked as if by talismanic incantation petitioner can convert the Court to a blind faith in the proposition that Congress has sole power

in this area. No one can contest the fact that Congress is granted specific powers under the Constitution, such as the Spending Power (Article I, Section 8, Clause 1), The Commerce Power (Article 1, Section 8, Clause 3) and the Equal Rights Enforcement Power (Section 5 of the 14th Amendment).

> "However, in no sense does that render it immune from judicial scrutiny and it is not to say we defer to the judgment of the Congress... on a constitutional question, or that we would hesitate to invoke the constitution should we determine that Congress has overstepped the bounds of its constitutional powers." 65 L.Ed.2d at 901-902.

The Court in Fullilove analyzed whether the objectives of the Public Works Employment Act were within a specific Congressional Power and if so, whether the particular use of racial and ethnic criteria was a constitutionally permissible means for achieving those objectives. Id. at 902.

In this case, the Court of Appeals directly addressed the issue of the School Board's authority. Quoting the same sentence in Fullilove the Court noted that:

> "The one crucial distinction between the two plans is that the program considered in Fullilove was mandated by Congress whereas the AAP at issue here was adopted by a local school board."

Because the constitutional authority which could be invoked by a school board is not comparable to that of Congress, the Court of Appeals declined to "automatically extend the result in Fullilove to the present case... accordingly the constitutionality of the Oakland Plan must be discreetly analyzed." After such analysis the Ninth Circuit expressly found that:

> "Under any of the recognized equal protection standards, the Oakland plan is justified by the School District's interest in remedying the lingering effects of the past discrimination in the school construction industry."

Congress may have unique authority but it is not possible to contend that it has exclusive authority in this area. As the Chief Justice reconized in Fullilove "The government does have a legitimate interest in ameliorating the disabling effects of identified discrimination." 65 L.Ed.2d at 936. (Citing Bakke and a series of desegregation cases.)

Nonetheless, petitioner claims that the desegregation cases are somehow "sui generis." Petitioner argues these cases do not support a school district's authority to institute an AAP for school construction. If the school desegregation cases constitute a separate jurisprudence then for what purpose do all our Nation's courts repeatedly read the mandate of equal protection to require racial integration in the educational context? What use would it be for students to become part of a racially integrated school system,

only then to find themselves segregated in the Nation's work force, its entrepreneurial force, or generally in society at large?

The Ninth Circuit addressed these questions:

> "Finally, it is perfectly appropriate that school boards be the body to assert an interest in remedying the effects of past discrimination in this particular industry. The school board is charged with vital responsibility of educating children. The declaration of Superintendent Love states that 84% of the students enrolled in the school district are non-white. For the school district to perpetuate the effects of past discrimination in school construction contract awards, could seriously undermine its credibility in a community with so large a non-white population, thereby impairing its capacity to educate children. We see nothing improper in the school district's laudible desire to set an example for the children to whom it is responsible for educating. To the contrary, the AAP is highly relevant to the school district's mission."

The goal of fostering racial equality is not the exclusive province of Congress but is a goal shared by our entire society, at every governmental level and in the private sector. Virtually every state constitution contains a provision comparable to the federal mandate of equal protection thereby demonstrating the ubiquitious governmental goal of fostering racial equality. Although Section 5 of the 14th Amendment confers unique enforcement powers on Congress, the Equal Protection Clause itself imposes an obligation on public officials at every level of government to be cognizant of the need for racial equality.

Certainly this Court has approved efforts in that direction by school boards, local government, even private employers. In North Carolina Board of Education v. Swann, supra, this Court sanctioned a school district's conclusion that as a

matter of educational policy, racial balance was desirable quite apart from constitutional requirements. In United Jewish Organizations v. Carey, supra, this Court upheld a county apportionment plan which was structured to insure that the percentage of districts in which there were non-white majorities would roughly approximate the percentage of non-whites in the county. In United Steel Workers of America v. Weber, supra, this Court validated a private employer's affirmative action plan where the purpose was to open up employment opportunities in historically segregated job categories. Petitioner cannot contend that it is somehow inappropriate for the Oakland School District to adopt a policy to remedy the effects of past discrimination in its own school construction contracts simply because this action will spawn other efforts by other agencies.

C. The School District's Affirmative Action Plan is Based on Proper Findings.

Next petitioner argues that a school district can adopt a remedial affirmative action plan only if it has made, and is competent to make, findings of identified discrimination. Findings may assure that the decision has been sifted through the political process. If the governmental agency shaping and implementing the plan understands the nature and extent of past discriminatory practices its rules are entitled to more respect than if adopted spontaneously and without debate. Valentine v. Smith, 654 F.2d 503 (8th Cir. 1981) Thus, Justice Powell in Bakke questioned whether the University of California was competent to make the requisite findings of constitutional or statutory violations which would provide a compelling justification for a race conscious remedy. 438 U.S. at 309-310.

The four other justices who reached the constitutional question in Bakke disagreed noting that a state university (like a School District) as a recipient of federal funds is explicitly authorized by federal regulations to "take affirmative action to overcome the effects of conditions which resulted in limiting participation by persons of a particular race, color or national origin." See 45 CFR Section 80.3 (b)(6)(ii)(1979). Justice Brennan in an opinion joined by Justices White, Marshall and Blackmun stated:

> "Indeed, the requirement of a judicial determination of a constitutional or statutory violation as a predicate for race conscious remedial actions would be self defeating. Such a requirement would severly undermine efforts to achieve voluntary compliance with the requirements of law. And our society and jurisprudence have always stressed the value of voluntary efforts to further the objectives of the law. Judicial intervention is a last resort to achieve cessation of illegal conduct or the remedying of its effects rather than a prerequiste to such efforts." 438 U.S. at 364.

Moreover, as recognized by the Court of Appeals the AAP challenged herein contains the findings which Justice Powell would require. Those findings cited above were made by the School Board after numerous meetings with construction industry representatives and public hearings at which non-white contractors complained that they had been excluded from participation in the bids of white general contractors. According to the unrefuted declaration of Superintendent Love, the School Board awarded 135 construction contracts for amounts of at least $100,000.00 each from 1947 until initial adoption of the AAP in 1975. Of these only one was awarded to a minority contractor and only two to joint ventures in which there was participation by minority owned firms. Adoption of the AAP resulted in an in crease in the volume of minority business

participation to 33.4% of the total dollar volume of $12,877,014 in 17 construction projects between December, 1975 and March, 1977. (Petition, Exhibit E, p.2.) Thus, the School Board's findings were not only based on ample experience in evaluating school construction proposals and in analyzing the operation of firms who submitted bids, but were borne out in the remedial results effectuated by the AAP in the School District's own school con-construction.

In fact, the disparities found by the School Board at the local level accurately mirror Congressional findings that discrimination had adversely affected minority firms in the construction industry generally. Public Works Employment Act of 1977, 42 U.S.C. Section 6705 (f)(1)(A). As the Chief Justice recognized in Fullilove:

> "...congress had abundant evidence from which it could conclude that minority businesses have been denied effective participation in public contracting opportunities by procurement practices that perpetuated the effect of prior discrimination...Congress had before it, among other data, evidence of long history of marked disparity in the percentage of public contracts awarded to minority business enterprises. This disparity was considered to result not from any lack of capable and qualified minority businesses but from the existence and maintenance of barriers to competitive access which had their roots in racial and ethnic discrimination and which continue today even absent any intentional discrimination or other unlawful conduct." 65 L.Ed.2d at 924.

Justice Powell reiterated the inescapable conclusion that "purposeful discrimination contributed significantly to the small percentage of federal contracting funds that minority business enterprises had received." 65 L.Ed.2d at 942 Beyond the evidence respecting federal procurement,

Congress was amply aware that "this pattern of disadvantage and discrimination existed with respect to state and local construction contracting as well." 65 L.Ed.2d at 924.

Just as Congress knew that the ability of minority group members to gain experience had been frustrated by the difficulty of entering the construction trades, the Oakland School Board was aware that racial discrimination had skewed the award of its own construction contracts. With this information at hand, it could well be said that the School District was under a constitutional duty to take appropriate steps to eradicate the effects of discrimination in its own construction program or it would have been a joint participant in subsidizing with public funds the discriminatory practices of private contractors. Hazelwood School District v. United States, 433 U.S. 299,

53 L.Ed.2d 768 (1977); Ethridge v. Rhodes, 268 F.Supp.83 (S.D. Ohio 1967).

III

THE MEANS CHOSEN BY THE SCHOOL DISTRICT ARE WELL TAILORED TO THE OBJECTIVE OF REMEDYING PAST DISCRIMINATION

The test for determining whether the School District has adopted constitutionally permissible means is whether the AAP is "substantially related" to the objective of remedying prior discrimination. Fullilove, 448 U.S. at 482-92; Bakke, 438 U.S. at 359. As will be demonstrated the Oakland School District could not practically achieve its objectives without the use of race conscious remedies in its school construction program.

Petitioner essentially contends that it has been asked to bear the brunt of the AAP even though it is innocent of any wrongdoing. Yet the Constitution does not forbid remedial consideration of race even when the remedy has a direct

adverse effect on others. It is in the nature of remedy that there must be some sharing of the burden of past discrimination. Franks v. Bowman Transportation, supra. Thus, this Court has approved race conscious remedies with varying impact on "innocent bystanders" from an increased tax burden borne by the public at large, Califano v. Webster, 430 U.S. 313, 51 L.Ed.2d 360(1977); to a reduction in the effectiveness of the vote of an identifiable group, United Jewish Organizations v. Carey, supra; to the denial of employment benefits to a limited number of individuals, Morton v. Mancari, 417 U.S. 535, 41 L.Ed.2d 290 (1974); Franks v. Bowman Transportation, supra. As the Chief Justice recognized in Fullilove:

> "Failure of non-minority firms to receive certain contracts is of course an incidental consequence of the program, not part of its objective. Similiarily, past impairment of minority firm access to public contracting opportunities may have been an incidental consequence of 'business as usual' by public contracting industries and among prime contractors." 65 L.Ed.2d at 928.

Even assuming that the complaining parties herein are themselves innocent of any discriminatory conduct, it was equally appropriate for the School Board as it was for Congress to recognize:

> "that in the past some non-minority businesses may have reaped competitive benefit over the years from the virtual exclusion of minority firms from these contracting opportunities." Ibid.

The AAP is perhaps the only effective means to crack the competitive barriers and to end the cycle which continually excluded minority businesses from proportionate

participation.

Furthermore, the Oakland AAP does not impose an onerous or oppressive requirement upon general contractors. Cf., analysis of Justice Powell in Fullilove, 65 L.Ed.2d at 947. In this sense, the Oakland Plan has more characteristics similar to the statute reviewed in Fullilove than to the admissons program reviewed in Bakke. Under the Davis Medical School admissions program, Bakke, an applicant with excellent grades and test scores was denied admission simply because he was white. In the instant case, petitioner had merely to exert every reasonable effort to contract with minority businesses for a certain proportion of the total dollar amount of the project. The minority participation requirement applied to all general contractors regardless of race. Only if it were proved that the non-white contractors or

sub-contractors would not bid with Schmidt and Pollard, or if the facts were that for practical reasons petitioner was required to perform more than 75% of the bid amount itself, would actual compliance with the AAP be foreclosed by the race of the general contractor.

Like the plan approved in Weber, the Oakland AAP does not create an absolute bar to white contractors. 443 U.S. at 208. No firm is totally foreclosed from an award of an Oakland school construction project so long as it makes the required effort to achieve minority participation. In addition, the Oakland AAP does not unduly stigmatize either the beneficiaries or any firm disadvantaged by an inability to meet its requirements. See Bakke, 438 U.S. at 374-375. The Oakland Plan merely exacts a covenant for present performance applicable to all general contractors bidding on school construction

projects and, as an added benefit, assures a larger pool of contractors will be available for future bidding.

As the Court of Appeals asserted in Contractors Association of Eastern Pa. v. Secretary of Labor, 442 F.2d 159 (3d Cir. 1971) cert. denied, 404 U.S. 854 (1972):

> "Plaintiffs are not being discriminated against. They are merely being invited to bid on a contract with terms imposed by the source of the funds. The affirmative action covenant is no different in kind than other covenants specified in the invitation to bid. The Plan does not impose a punishment for past misconduct. It exacts a covenant for present performance." 442 F.2d at 176.

The AAP might aptly be described as a "gentle nudge" to white contractors down the path of hiring and utilizing minority businesses. M.C. West, Inc. v. Lewis, 522 F.Supp.338 (M.D. Tenn. 1981).

In order to promote voluntary action, case law establishes that public agencies have wider discretion than the judiciary in formulating and implementing programs designed to combat racial discrimination. Swann v. Charlotte-Mecklenburg Board of Education, supra at 16-19. The Court in Associated General Contractors v. Altschuler, 490 F.2d 9 (1st Cir. 1973) recognized the extent of this discretion when it reviewed a 20% minority workforce requirement:

> "Courts are ill equipped to judge the accuracy of such assessments so long as contractors receive notice and a meaningful opportunity to challenge any allegations of non-compliance... It is less important that a particular percentage goal might be slightly optimistic or unrealistic given the current availability of qualified minority workers." 490 F.2d, p. 19.

It is this kind of flexibility which led the Court of Appeals to characterize the

Oakland AAP as a plan which merely considers race as a factor rather than as a regime of strict racial quotas.

Like the federal plan upheld in Fullilove, the Oakland Plan encourages bidders to utilize minority owned firms for a specified percentage of the contract amount but contains numerous exceptions and fair procedures. The School Board may, after hearing, award the contract to a bidder who has not met the 25% requirement if "the contractor has taken every possible measure to comply, it is not practicable to demand compliance in the particular case and it is in the best interests of the school district to award the contract." The Board may also depart from the 25% goal when the contract consists primarily of work in highly specialized crafts for which there are insufficient minority firms available. The plan further contemplates its own revision based upon changes

in the level of participation by minority owned businesses, just as the federal plan is subject to reassessment and reevaluation by Congress prior to any extension or enactment.

Finally, and perhaps most important, there is the evidentiary hearing granted to any contractor in apparent non-compliance with the responsibility requirements of the specifications. It has been suggested that a substantial defect in the University program reviewed in Bakke may have been the lack of procedures ensuring individualized treatment. See Lawrence Tribe, "Perspectives on Bakke and Equal Protection, Procedural Fairness or Structural Justice?" 92 Harv. L.R. 864, 867-73 (1979). In the instant case an individualized determination was made by the School Board following hearings on April 5 and 13, 1977. The hearing is part of the file in this case. It was substantial and fair, and

petitioner mounts no procedural due process attack thereon. While it may be conceded in this particular case that the decision on the factual question of practicability of compliance was a close one, review of the administrative decision was available to petitioner in the state courts. California Code of Civil Procedure, Section 1094.5. Thus, as in Fullilove, the provisions for discretionary administrative waivers enhanced the precision with which the plan fulfilled the desired objectives.

Because there are no bright line distinctions between permissible and impermissible requirements of affirmative action plans, a flexible evaluation of the particular methods adopted is appropriate. Had the School District adopted no plan it might have incurred liability for perpetuating the past discrimination it had found in its own construction program.

Having initiated a plan, and having defended it in protracted litigation in the state courts, the School District now faces possible liability in this action.

In light of this dilemma, and of the broad discretion afforded governmental entities engaged in good faith efforts to remedy past discrimination, this Court should also be reluctant to discourage some experimentation. In Fullilove, the Chief Justice quoted with approval the statement of Justice Brandeis:

> "To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be frought with serious consequences to the nation." 448 U.S. at 491, 65 L.Ed.2d 933.

The attempt to ameliorate the effects of past discrimination is a difficult task for which the Oakland School District has adopted a reasonable approach. The School District's AAP falls cleanly

within the parameters and guidelines established by this Court for valid affirmative action programs.

IV

THERE IS NO CONFLICT AMONG THE CIRCUITS ON THE VALIDITY OF AFFIRMATIVE ACTION

Petitioner's attempt to demonstrate that decisions among the federal courts of appeals are in conflict merely serves to show that this Court has adequately clarified the law respecting affirmative action.

The first case cited, Owen of Georgia, Inc. v. Shelby County, 648 F.2d 1084 (6th Cir. 1981) is simply inapposite. This was a diversity case in which the federal court performed its role of determining the applicable state court ruling which the highest court in Tennessee would adopt in the circumstances.

The alleged contradiction between the decision upon which review is sought here and Associated General Contractors

v. San Francisco Unified School District, 616 F.2d 1381 (9th Cir. 1980) concerns a federal court interpretation of state law. As explained in Section V. below, the Ninth Circuit in the case at bar declined to exercise pendent jurisdiction here because it would have required original interpretation of further state law issues on the liability for damages.

There is a conflict between the cited case of Central Alabama Painting Inc. v. James, 499 F.Supp. 629 (M.D., Ala. 1980), and another federal district court decision, M.C. West, Inc. v. Lewis, supra, respecting preferences for minority owned firms in the award of federal highway construction contracts by the Department of Transportatation. However, the conflict in these cases involved a question of Congressional authorization to a federal agency, and the fact finding processes followed by that

agency in adopting its regulations. In no way could that conflict be resolved in this litigation. Petitioner cites another District Court case, Pettinaro Construction Co. v. Delaware Authority for Regional Transit, 500 F.Supp. 559 (D. Del. 1980), in which the lower court merely denied a motion for summary judgment because substantial issues of fact remained for determination after trial.

Petitioner acknowledges in citing Valentine v. Smith, supra, that it supports the decision reached by the Ninth Circuit in the case at bar. Indeed we are unable to find any point of law on which the Valentine decision poses a conflict with the determination in this case.

Finally, petitioner quotes from Setser v. Novack Investment Co., supra, dealing with the challenge of a white prospective employee under 42 U.S.C.,

Section 1981 to the affirmative action program of a private employer. However, on the precise point which petitioner contends raises a conflict among the circuits, the 8th Circuit vacated Setser in an en banc decision at 657 F.2d 962 (8th Cir. 1981). A decision of the full 8th Circuit cites a series of other decisions since Weber upholding affirmative action plans against Section 1981 challenges. Local 35 v. City of Hartford, 625 F.2d 416 (2nd Cir. 1980); United States v. City of Miami, 614 F.2d 1322, rehearing granted, 625 F.2d 1310 (5th Cir. 1980); Detroit Police Officers Assn. v. Young, 608 F.2d 671 (6th Cir. 1979); Baker v. City of Detroit, 483 F.Supp. 930 (E.D., Mich. 1979). Nothing in Setser, or in any of the other cited decisions, conflicts with the ruling of the 9th Circuit here. Nothing in any of the cited cases suggests that public

agencies, private employers, or the lower courts are having any difficulty applying affirmative action guidelines set forth by this Court in Bakke, Weber and Fullilove.

V

THE COURT OF APPEALS PROPERLY DECLINED TO EXERCISE PENDENT JURISDICTION TO RESOLVE STATE LAW ISSUES

In Associated General Contractors v. San Francisco Unified School District, supra, the Ninth Circuit held that the AAP of the San Francisco School District violated California Ed. Code, Section 39640 which requires that school construction contracts be awarded to the "lowest responsible bidder." However, the Court of Appeals had ample reasons for declining to rule on the state law issues in the instant case not raised in AGC.

As the Court in this case noted, the plans of the two school districts differ in important respects which affect their constitutional validity. E.g., the

explicit findings of past discrimination and the provisions for administrative waivers following due process hearing. In addition, white contractors had sought over a period of years to enjoin the Oakland plan but had been unable to obtain relief in the California Courts.

Perhaps the most significant difference noted by the Ninth Circuit is that the plaintiffs (petitioner) herein sought monetary damages. Thus, petitioner was forced to concede at oral argument that there is a serious question under California law as to whether damages would be available for violation of California Ed. Code, Section 39640, even if such a violation were ultimately found. Moreover, school boards are not liable under California law for injuries caused by their exercise of discretion, even if such discretion is abused. California Govt. Code, Section 820.2. Based upon

that statutory authority, California courts have uniformly denied tort liability of a public entity under Govt. Code, Section 815 et seq. to a bidder claiming misaward of a public construction contract. Southern Cal. Acoustics Co. v. C.V. Holder, Inc., 71 Cal.2d 719, 79 Cal.Rptr. 319 (1969); Rubino v. Lolli, 10 Cal.App.3d 1059, 89 Cal.Rptr. 320 (1970). Thus, for petitioner to have prevailed in the case at bar, a federal court would have been required to resolve a question of state law differently than it had previously been resolved in the state courts.

Pending the appeal in this case, the basis for the ruling of the District Court was undermined by Owens v. City of Independence, supra, which held that the qualified good faith immunity available to local officials was unavailable as a defense to the public entity itself. Thus, the Ninth Circuit was squarely

presented with the federal Constitutional issue as to the validity of the School District's AAP. Having resolved that issue in favor of the School District, and mindful of this Court's admonition in United Mine Workers of America v. Gibbs, 383 U.S. 715, 16 L.Ed.2d 218 (1966), the Court of Appeals declined to become entangled in the state law issues.

Gibbs makes clear that federal courts have technical power to determine some state law claims under pendent jurisdiction, but have discretion not to exercise such power:

> "Certainly if the Federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well." 383 U.S. at 726.

In Moor v. County of Alameda, 411 U.S. 693, 36 L.Ed.2d 596 (1973), both federal and state causes of action were alleged against the County. The District

Court properly refused to exercise pendent jurisdiction over the state law claims due to the fact that a federal court trial would have required evaluation of questions of California law in the area of special defenses available to the county under the California Tort Claims Act. Considerations of comity are particularly strong where the federal courts in the exercise of pendent jurisdiction would be required, as in this case, to resolve difficult questions of state law upon which state court decisions are not legion. Id. at 715-717.

Frustrated in their efforts to obtain a federal court decision which was already denied them in the state court litigation, the Associated General Contractors have submitted an amicus curiae brief to this Court asserting the well accepted principle that federal courts should avoid reaching constitutional questions if it is possible to resolve

the matter on non-constitutional grounds. However, the cases cited by Amicus involve either diversity jurisdiction where state law issues were necessarily addressed by the federal courts, or matters which could be disposed of on federal non-constitutional grounds. None of the cited cases depart from the well established doctrine of pendent jurisdiction which the Ninth Circuit followed in declining to consider the state law issues here.

Beset with similar frustrations, petitioner attempts to confuse the question of the School District's authority under the state low responsible bid statute with the federal issue as to whether it is appropriate for a school district or other public entity to adopt an affirmative action plan. Even if the Oakland School District's AAP were in violation of the California statute, it would not amount to a deprivation of civil rights

secured by the Constitution and laws of the United States. Thus, the state authority issue is not cognizable in a suit brought under 42 U.S.C., Section 1983. California v. LaRue, 409 U.S. 109, 110 (fn. 1), 34 L.Ed.2d 342 (1972). This is especially true since the basic purpose of an award in a suit brought under the Civil Rights Act is compensation for injuries caused by deprivation of civil rights. Carey v. Piphus, 435 U.S. 247, 55 L.Ed.2d 252 (1978). Here, the Court of Appeals has found no such deprivation.

A long state history of interpretation concerning the low responsible bidder law has established that a public entity is given broad discretion to set its own particular responsibility requirements. See Raymond v. Fresno City Unified School District, 123 Cal.App. 2d 626, 267 P.2d 69 (1954); West v. City of Oakland, 30 Cal.App. 556, 159 p. 202

(1916). The California Supreme Court in City of Inglewood-L.A.County Civic Center Authority v. Superior Court, 7 Cal.3d 861, 103 Cal.Rptr. 689 (1972) did not limit this discretion but only established that a local public entity had no authority to consider "relative responsibility" between bidders who otherwise met contract requirements. Inglewood did not decide which particular responsibility criteria were permissible or impermissible under state law. Certainly no authority has considered state responsibility criteria impermissible because they might involve "social policy."2/ And certainly no

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2/ The criteria of "responsibility" under state law must have reference to the "quality, fitness and capacity of the low bidder to satisfactorily perform the proposed work." Id. at 867. This standard is quite broad. Thus, no one disputes that, as a criterion of "responsibility", workers' compensation insurance may properly be required. While it may be debatable to what extent the inclusion of such socially desirable criteria

federal question is implicated by this state legal history.

Finally, as to the state law question, the Ninth Circuit's earlier ruling in Associated General Contractors v. San Francisco Unified School District, supra, was simply not dispositive on the question of liability for money damages. It would be patently unfair to hold the Oakland School Board liable based on the holding in AGC, for a discretionary

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directly enhances the quality, fitness or capacity of the bidder to perform the construction work, it may obviously be argued that such criteria do ultimately serve these proper purposes. See also: Brunsfeld & Sons v. Board of Education, 369 N.E. 2d 283 (Ill.App. 1977); Weiner v. Cuyahoga Comm. College Dist., 19 Ohio 2d 35, 249 N.E. 2d 907 (1967); Image Carrier Corp. v. Beam, 567 F.2d 1197 (2nd Cir. 1967).

good faith decision under the state of the law at the time it was made and based on legal advice reflecting protracted litigation over the Oakland AAP in the California courts.

CONCLUSION

For the reasons stated above, respondents respectfully request that this Court deny the Petition.

Dated: March 30, 1982

Respectfully submitted,

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Petitioner's Reply Brief

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No. 18-1444

In the Supreme Court of the United States

OCTOBER TERM, 1981

JOHANN SCHMIDT and LELAND POLLARD, individually and doing business as Schmidt & Pollard, a California partnership,

PETITIONERS,

v.

OAKLAND UNIFIED SCHOOL DISTRICT, ET AL.

RESPONDENTS

REPLY BRIEF OF PETITIONERS

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JOHANN SCHMIDT and LELAND POLLARD, Individually and Doing Business as SCHMIDT & POLLARD, a Partnership; JOT BROWN, LUZ BROWN, and JOT BROWN, Inc., a California corporation,

Plaintiffs-Appellants,

v.

OAKLAND UNIFIED SCHOOL DISTRICT, OAKLAND BOARD OF EDUCATION, DAVID TURKER, JR., MELVIN J. CAUGHELL, CHARLES W. GOADY, BARNEY E. HILBURN, LORENZO N. HOOPES, SEYMOUR M. ROSE, and PEGGY STINNETT,

Defendants-Appellees

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The appellate court recognized that petitioners have stated a *prima facie* case of racial discrimination under 42 U.S.C.§§1981 and 1983. "If either Schmidt or Pollard had been a member of one of the minority groups specified in the A.A.P., the proposal of their partnership would have been accepted. It is specious, therefore, to argue that plaintiffs did not allege racial discrimination." 662 F.2d at 555. Nevertheless, the Ninth Circuit found such racial discrimination to be lawful under the two federal Civil Rights acts in question.

I. THE COURT OF APPEALS' DECISION CREATES AN ENTIRELY NEW JURISPRUDENCE BY HOLDING THAT ELIMINATION OF PRIVATE DISCRIMINATION AMONG BUILDING CONTRACTORS IS PART OF THE SCHOOL DISTRICT'S EDUCATIONAL MISSION.

Unlike the school districts in the pupil assignment cases on which respondents rely exclusively for authority, the racial classification here was not undertaken by the school district to cure *its own* past discrimination. Instead, the school district has undertaken to cure alleged *private* "past discrimination in one particular industry, or, more accurately, in one particular sector of an industry — school construction contracts." 662 F.2d at 558. The Court of Appeals concluded that this effort "is highly relevant to the School District's mission" and that "it is perfectly appropriate that the School Board be the body to assert an interest in remedying the effects of past discrimination in this particular industry." 662 F.2d at 559.

The Court of Appeals found that school districts have inherent authority (analogous to Congress' power under Clause 5 of the Fourteenth Amendment) to enact a minority set-aside for school construction contracts.

> Moreover, the Equal Protection Clause itself, although lacking a state counterpart to Section 5, requires state officials to be cognizant of the need for racial equality.

662 F.2d at 558.

The Court then equates the "need to be cognizant of racial equality" with a power — and perhaps a duty — for the school district to take affirmative measures to remedy perceived lingering effects of past discrimination by the construction contractors with whom it does business. "For the School District to perpetuate the effects of past discrimination in school construction contract awards could seriously undermine its credibility in a community with so large a non-white population, *thereby impairing its capacity to educate children.*" (emphasis added.) 662 F.2d at 559.

Thus it is possible for respondents to make the remarkable assertion that "it could well be said that the School District was under a constitutional duty to take appropriate steps to eradicate the effects of discrimination in its own construction program or it would have been a joint participant in subsidizing with public funds the discriminatory practices of private contractors." (Brief in Opposition at 29.) The Ninth Circuit thus conferred upon the Oakland Unified School District a broad power to adjudicate claims of past discrimination in the construction contracting industry

and to formulate a broad legislative policy just as Congress did in *Fullilove v. Klutznick*, 448 U.S. 448 (1980).

This is a new and wholly unprecedented power inherent in the educational mission: to remedy past discrimination in the school construction industry so as to provide role models for school children and to avoid undermining the credibility of the educational institution. By analogy, the school district probably could assert the same power to remedy past discrimination in other suppliers of goods and services such as text book publishers, food service, city bus transportation and the like. Petitioners are unaware of any judicial authority holding that the educational mission encompasses an affirmative authority of the school district to tackle private discrimination in the construction trades.

The creation of such a dramatic new source of authority for school districts, deriving from the Fourteenth Amendment is novel and of sweeping importance. It is clearly "an important question of federal law which has not been, but should be, settled by this Court. . . ." Rules of Supreme Court, Rule 17(1)(c).

II. THE COURT OF APPEALS HAD BEFORE IT NO COMPETENT STATISTICAL EVIDENCE TO SUPPORT ITS APPROVAL OF THIS RACIAL CLASSIFICATION.

The record in the court below contained virtually no evidence in support of the school district's assertions that sufficient past discrimination existed to require the extraordinary remedy of a twenty-five percent racial quota. The sparse record results from the fact that the District Court never even considered the issue, finding

as it did that "Even if defendant's affirmative action plan was unconstitutional, defendants acted in good faith in adopting and implementing the plan" and were immune from liability. (Petitioners' Exhibit B).

Hence the Court of Appeals relied on a single declaration which stated the racial make-up of the district's pupils and the number of construction contracts which had been let to minority contractors. The Court of Appeals also procured on its own and outside the record a census figure for the minority population of the City of Oakland (although it is unclear whether the boundaries of the city coincide with those of the school district).

In *Hazelwood School District v. U.S.* 433 U.S. 299 (1977), this Court reversed and remanded for further findings a suit which alleged racial discrimination in the hiring of school teachers. This Court ruled that comparing the racial make-up of the student population with the racial distribution of teachers did not prove statistical imparity. Instead "a proper comparison was between the racial composition of Hazelwood's teaching staff and the racial composition of the qualified school teacher population in the relevant labor market." See also *Teamsters v. U.S.* 431 U.S. 324 (1977).

No evidence was ever introduced in this case concerning the racial composition of contractors and sub-contractors in the relevant market. Absent such information, the Court of Appeals was unable to conduct the searching inquiry necessary whenever an inherently suspect classification is used to deny a contract or other right on the basis of race.

CONCLUSION

The Ninth Circuit's decision is too important an innovation in the law of affirmative action for this Court not to review it.

DATED: April 26, 1982.

ROGER J. MARZULLA, ESQ.

Amicus Brief

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v.

OAKLAND UNIFIED SCHOOL DISTRICT, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Brief Amicus Curiae of Associated General Contractors of California, Inc., in Support of the Petition for a Writ of Certiorari

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No. 81-1444

IN THE

Supreme Court of the United States

October Term, 1981

JOHANN SCHMIDT and LELAND POLLARD, individually and doing business as SCHMIDT & POLLARD, a California partnership,

Petitioners,

v.

OAKLAND UNIFIED SCHOOL DISTRICT, *et al.*,

Respondents.

Brief Amicus Curiae of Associated General Contractors of California, Inc., in Support of the Petition for a Writ of Certiorari

This brief in support of the Petition for a Writ of Certiorari in the within action is submitted pursuant to Rule 36.1 of the Rules of the Supreme Court and with the written consent of counsel to both parties, filed with the Clerk of the Court.

I.
INTEREST OF THE AMICUS CURIAE

Amicus curiae Associated General Contractors of California, Inc. ("AGC"), is a non-profit regional trade association of general construction contractors in the State of California. AGC is composed of over 800 construction member firms which perform nearly 70 percent of the annual dollar volume of all nonresidential construction, in California and in excess of 50 percent of the annual dollar

volume of public works construction for local, state and federal governmental entities in California. AGC's members include both small, closely-held construction companies doing business in a single locality and large construction contractors doing business on a state-wide or nation-wide basis.

AGC's membership includes a number of "minority business enterprise" contractors. AGC's membership includes both unionized and "open shop" contractors.

In the interests of its members and the public, AGC is concerned with the constitutionality, fairness, uniformity and efficiency of treatment which contractors receive from governmental agencies in the State of California. AGC is particularly concerned with the legal issues presented in the present action, which appear to involve important questions of public policy and which apparently conflict with applicable legal precedent.

AGC is called upon to furnish advice and assistance to its members who are public works contractors in interpreting and complying with minority business enterprise requirements promulgated by public agencies. The resolution of this case will have an important impact on the approach taken by public works contractors to minority business enterprise programs adopted by such agencies in the future.

II.
SUMMARY OF ARGUMENT

AGC, as amicus curiae, wishes to press four essential points in this brief:

1. This Court has said, many times, that federal courts should avoid the disposition of constitutional questions wherever a case may be resolved on non-constitutional grounds. It was clear error for the Ninth Circuit Court of Appeals to reach the question of the constitutionality of the Affirmative Action Program adopted by the Oakland Unified School District, when a substantial possibility existed

that this case could have been resolved by an interpretation of California law. The proper course was for the Ninth Circuit to remand this case to the district court to determine whether the Oakland Unified School District lacked authority to adopt its Affirmative Action Program, in light of California's "lowest responsible bidder" law (Cal. Educ. Code §39640) and, if so, whether plaintiffs were entitled to damages as a result.

2. It was improper, and contrary to well-established legal precedent, for the Ninth Circuit to pass on the constitutionality of the Affirmative Action Program promulgated by the Oakland Unified School District without benefit of a full evidentiary record in the court below. The action was dismissed by the district court on grounds unrelated to the constitutionality of the Oakland Unified School District's Affirmative Action Program. No trial has ever been held on this issue, yet the Ninth Circuit elected to pass on a serious question of constitutional law, based on a record consisting of a skimpy stipulation of facts and a few declarations.

3. The Ninth Circuit's analysis of the constitutionality of the Affirmative Action Program promulgated by the Oakland Unified School District is fatally flawed, in light of this Court's decisions in *Fullilove v. Klutznick*, 448 U.S. 448, 100 S.Ct. 2758 (1980), and *University of California v. Bakke*, 438 U.S. 265, 98 S.Ct. 2733 (1978). Specifically, the Ninth Circuit's opinion fails to demonstrate:

(a) Any legal authority vested in the Oakland Unified School District to promulgate an Affirmative Action Program to remedy perceived social ills in the construction industry;

(b) Any relevant evidence to support the "reasonableness" of the 25 percent quota established by the Affirmative Action Program;

(c) Any evidence which would show that the so-called "hearing" procedures accorded by the Affirmative Action

Program provide adequate due process to contractors who fail to qualify for the award of construction contracts from the Oakland Unified School District by virtue of their inability to meet the quota imposed by the Program.

4. The Ninth Circuit's opinion opens the door for every state and local public agency in the United States to fashion its own minority business enterprise program, based entirely upon its own conceptions of social justice, without regard to the competence of the particular agency to conduct an investigation of racial discrimination and prescribe appropriate remedies for such discrimination.

III.
STATEMENT OF FACTS

In order to understand fully the points urged herein, a brief recitation of the facts is necessary.

In December, 1975, the Oakland Unified School District (the "District") acting through its governing body, the Board of Education (the "Board") promulgated a revised Affirmative Action Policy ("AAP") which was to apply to school construction projects on which bids exceeded $100,000. Under the provisions of the revised AAP, each general contractor submitting a bid was required to provide evidence that "minority owned businesses" would be utilized to perform work constituting at least 25 percent of the total general contract dollar bid. (See Joint Pre-Trial Statement ¶D.1, Exhibit E to the Petition for Writ of Certiorari [hereinafter the "Joint Statement"].) Compliance with the 25 percent minority business enterprise participation policy was required in order for a bidder to be considered "responsible," and thereby eligible for award of a construction contract let by the District. The Board revised the AAP on March 29, 1977 to provide, *inter alia*, for a hearing procedure for low monetary bidders whose bids appeared not to comply with the AAP. (Joint Statement ¶D.3.)

In February, 1977, the District advertised for bids for a contract to refurbish the Grove Street campus of Oakland

Technical High School ("the project"). On March 15, 1977, the firm of Schmidt & Pollard submitted a bid of $160,380 for performance of the project; Thomas and Cotrell, a joint venture, submitted a bid of $167,000 for performance of the project. (Joint Statement ¶D.6.)

Schmidt & Pollard is a partnership engaged in general contracting, whose partners are white. (Joint Statement ¶13.) Schmidt & Pollard's proposal for construction of the project provided that Jot Brown, Inc., a 50 percent minority owned company, would perform approximately 16 percent of the total dollar value of the work as a subcontractor. (Joint Statement ¶6.) No other minority business enterprise was to participate as a subcontractor of Schmidt & Pollard.

Thomas and Cotrell is a joint venture, owned 65 percent by Thomas, who is white, and 35 percent by Cotrell, who is black. *Schmidt v. Oakland Unified School District*, 662 F.2d 550, 553 (9th Cir. 1981).

Although Schmidt & Pollard submitted the lowest bid, the District found it to be in apparent noncompliance with the AAP, for failure to provide for at least 25 percent minority participation. 662 F.2d at 553. Schmidt & Pollard was afforded a hearing by the Board, at which they argued that they had taken every possible measure to obtain sufficient minority participation; the Board rejected their bid and awarded the project contract to Thomas and Cotrell. *Id.*

Schmidt & Pollard filed suit in U.S. District Court in San Francisco, seeking damages from the District, the Board and its members, on the theory that failure to award the project contract to the partnership was a racially discriminatory act denying it equal protection of the laws, in violation of 42 U.S.C. sections 1981 and 1983. Schmidt & Pollard also claimed damages on the theory that the AAP had been promulgated in violation of California Education Code section 39640, the "lowest responsible bidder" law. *Id.*

The parties filed cross-motions for summary judgment in the district court. On December 10, 1979, the district court entered an order granting summary judgment to the defendants, on the theory that

> "even if defendants' affirmative action plan was unconstitutional, defendants acted in good faith in adopting and implementing the plan. Therefore, defendant members of the School Board are immune from liability. *Wood v. Strickland*, 420 U.S. 308 (1975). This immunity extends to defendants School District and Board of Education as well. *Sala v. County of Suffolk*, 604 F.2d 207 (2d Cir. 1979); *Bertot v. School District No. 1*, ___ F.2d ___, 47 U.S.L.W. 2336 (10th Cir. 1978)."

See Exhibit B to the Petition for Writ of Certiorari.

Since no injunctive relief was requested in the suit, the district court did not reach the question of whether promulgation of the AAP violated the "lowest responsible bidder" law. However, the same district court had previously ruled that a similar Affirmative Action Plan adopted by the San Francisco Unified School District was illegal because its adoption was in excess of the San Francisco School District's statutory authority, and in contravention of the provisions of California Education Code section 39640. *See Associated General Contractors of California v. San Francisco Unified School District*, 431 F. Supp. 854 (N.D. Cal. 1977) (refusal to dissolve preliminary injunction, permanent injunction entered later), *aff'd*, 616 F.2d 1381 (9th Cir. 1980), *cert. denied*, 449 U.S. 1061, 101 S.Ct. 783 (1981).

Schmidt & Pollard appealed to the Ninth Circuit, which entered an order affirming the dismissal of the action. The Ninth Circuit's opinion notes that, under this Court's decision in *Owen v. City of Independence*, 445 U.S. 622, 100 S.Ct. 1398 (1980), local government bodies do not enjoy even a qualified immunity from liability for damages under 42 U.S.C. section 1983. Although this Court's decision in

Owen renders the district court's determination incorrect, the Ninth Circuit nevertheless affirmed the judgment on "alternative grounds" which were not fully litigated in the court below. 662 F.2d at 554.

IV.
REASONS THE PETITION SHOULD BE GRANTED

A. The Court Should Grant Certiorari to Vindicate the Established Principle That Constitutional Issues Should Not Be Reached When a Case May Be Resolved Through Statutory Construction.

Rather than remand the case to the district court for further proceedings, the Ninth Circuit proceeded, on a skimpy record consisting of a brief stipulation of facts and several declarations submitted in the court below, to consider the difficult and hotly contested question of whether the AAP adopted by the District was constitutionally sound.

In reaching its decision, the Ninth Circuit side-stepped two critical issues of California law which are potentially dispositive of this case: (1) Whether the "lowest responsible bidder" provisions of California Education Code section 39640 preclude a local school board from promulgating its own Affirmative Action Plan, not otherwise authorized by state law; and (2) whether violation by a local school board of the lowest responsible bidder law gives rise to a right to monetary damages. 662 F.2d at 560.

It is a well established principle of federal law that the U.S. Supreme Court and inferior courts will avoid the decision of constitutional issues whenever cases may be resolved by resort to statutory construction or other devices of non-constitutional dimension.

For example, in *Clay v. Sun Insurance Office, Ltd.*, 363 U.S. 207, 80 S.Ct. 1222 (1960), the Supreme Court refused to consider constitutional questions which arose in an action in federal court based upon an insurance policy. John Clay, while a resident of the State of Illinois, had purchased an

insurance policy from the Sun Insurance Office, a British corporation. The policy contained an expansive provision purporting to insure Clay against loss or damage to property on an "all risks" basis. Clay filed a claim under the policy for property loss, which the insurance company denied, on the ground that the property had been willfully damaged by Clay's wife. When Clay sued the company, the company defended on this theory, and on the additional theory that, under Illinois law, the statute of limitations had run on Clay's claim. The case was tried in U.S. District Court in Florida, which held that, under a Florida statute, any shorter statute of limitations which the State of Illinois might seek to apply to Clay's claim would be ineffective. The Court of Appeals for the Fifth Circuit reversed, finding that the refusal of the Florida court, based upon Florida law, to apply the Illinois statute of limitations, violated Sun Insurance's right to due process of law.

The Supreme Court reversed, finding that the Fifth Circuit had failed to dispose of the two non-constitutional questions, *i.e.*, the issue of whether the insurance policy covered damage to property resulting from willful injury and the issue of whether Florida did, in fact, preclude the application of the Illinois statute of limitations.

The Supreme Court noted that a statutory scheme existed in Florida, under which a federal court could certify an unresolved issue of state law for determination in the Florida Supreme Court, and implied that this procedure should have been followed in the *Clay* case. The Court went on to note, however:

> "Even without such a facilitating statute we have frequently deemed it appropriate, where a federal constitutional question might be mooted thereby, to secure an authoritative state court's determination of an unresolved question of its local law. See Allegheny County v. Frank Mashuda Co., 360 U.S. 185, 189, 79 S.Ct. 1060, 1063 . . . ."

363 U.S. at 212, 80 S.Ct. at 1226 (citations omitted).

The principle of refusing to entertain constitutional issues where issues of lesser moment may be dispositive has been repeatedly reaffirmed by this Court. For example, last term, in *Gulf Oil Co. v. Bernard*, ___ U.S. ___, 101 S.Ct. 2193 (1981), the Court was faced with a challenge to a federal court order prohibiting parties to a class action and their attorneys from communicating with potential class members. The Fifth Circuit Court of Appeals had ruled that this order was an unconstitutional prior restraint on free expression, protected by the First Amendment to the Constitution. The Supreme Court explicitly declined to consider this issue, stating: "As the concurring judges below recognized, prior to reaching any constitutional questions, federal courts must consider nonconstitutional grounds for decision. See *Ashwander v. TVA*, 297 U.S. 288, 347, 56 S.Ct. 466, 483, 80 L.Ed. 688 (1936) (Brandeis, J., concurring)." ___ U.S. at ___, 101 S.Ct. at 2199 (citation omitted).

Circuit courts have routinely recognized the validity of this principle. *See White v. United States Pipe & Foundry Co.*, 646 F.2d 203, 206 (5th Cir. 1981); *United States v. South Dakota*, 636 F.2d 241, 243 n. z (8th Cir. 1980) ("A general principle of judicial administration is that 'dispositive issues of statutory and local law are to be treated before reaching constitutional issues.' *Wolston v. Reader's Digest Ass'n, Inc.*, 443 U.S. 157, 161, n. 2, 99 S.Ct. 2701, 2704, n. 2, 61 L.Ed.2d 450 (1979)").

In the present action, the question of whether California Education Code section 39640 precludes the Oakland Unified School District from promulgating an Affirmative Action Plan which results in the award of construction contracts to parties other than the lowest monetary bidder, could be dispositive of Schmidt & Pollard's claim. *See Associated General Contractors of California v. San Francisco Unified School District*, 616 F.2d 1381 (9th Cir. 1980), *cert. denied*, 449 U.S. 1061, 101 S.Ct. 783 (1981). It is clear, as the

Ninth Circuit noted, that the sole reason that Schmidt & Pollard lost the construction contract was because of the race of Schmidt and Pollard, the principals. 662 F.2d at 554-55. Therefore, if the Board acted illegally and in excess of its authority in enacting the AAP, Schmidt & Pollard would appear to be entitled to damages in the amount of its lost profits on the contract. Resolution of that issue, under California law, would d ose of the case.

By refusing to reach this question and, instead, proceeding to address difficult constitutional issues on a virtually barren record, the Ninth Circuit gratuitously created new constitutional doctrines which will disrupt public works construction law for many years to come.

There is nothing in the Ninth Circuit's opinion which would suggest why the court chose to address the question of the constitutionality of the Affirmative Action Plan, rather than remanding the case for further proceedings in light of this Court's decision in *Owen v. City of Independence*, 445 U.S. 622, 100 S.Ct. 1398 (1980).

B. The Ninth Circuit Improperly Addressed Constitutional Issues in the Absence of a Full Evidentiary Record.

It is well established that federal courts, including appeals courts, should not reach "the constitutional questions raised by appellants where issues of fact are involved on less than a full record of an adversary proceeding." *Contreras v. Merced High School District*, 415 F.2d 771 (9th Cir. 1969); *accord*, *Braden v. University of Pittsburgh*, 477 F.2d 1, 4 (3d Cir. 1973).

In the *Braden* case, the Third Circuit Court of Appeals was called upon to decide whether the Commonwealth of Pennsylvania "has so far insinuated itself into a position of interdependence" with the University of Pittsburgh that it should be considered a joint participant in alleged sexual

discrimination. 477 F.2d at 4. The Third Circuit declined to consider the issue, stating as follows:

> "It would perhaps be possible for us to decide this last issue on the present record but we think we should not do so. Very important constitutional questions are presented and the Supreme Court has repeatedly informed us that such difficult issues should not be decided except upon a full record and after adequate hearing. Polk Co. v. Glover, 350 U.S. 5, 59 S.Ct. 15, 83 L.Ed. 6 (1938); Bordens Farm Products v. Baldwin, 293 U.S. 194, 55 S.Ct. 187, 79 L.Ed. 281, concurring opinion, 293 U.S. 213, 55 S.Ct. 193, 79 L.Ed. 290 (1934) [additional citations omitted]."

477 F.2d at 4-5.

It is almost unbelievable that the Ninth Circuit Court of Appeals would believe itself capable of deciding the extraordinarily difficult constitutional issues raised by the present case on the sparse record before it, which consisted of a brief stipulation of facts and declarations filed in the district court. No oral evidence was taken and no opportunity for cross-examination was presented.[1]

In these circumstances, it seems certain that it was an abuse of discretion for the Ninth Circuit to arrogate to itself, in the first instance, the power to reach difficult and sensitive issues of constitutional law. *Cf., DeBacker v. Brainard*, 396 U.S. 28, 90 S.Ct. 163 (1969); *Cowgill v. California*, 396 U.S. 371, 90 S.Ct. 613 (1970) (per curiam) (Harlan, J. concurring).

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[1]In fact, the Ninth Circuit blatantly oversteps the limits of its authority, by making findings of fact on issues contested by the parties at the district court level. In support of the assertion that an adequate finding of discrimination exists to support the District's AAP, the Ninth Circuit cites a declaration submitted in the district court by Ruth B. Love, the Oakland School superintendent. 662 F.2d at 558-59. The contents of Ms. Love's declaration were never stipulated by the parties to be correct. Since no trial was held, no opportunity was presented to cross-examine Ms. Love, or place rebuttal evidence before the trial court.

In the present case, there is a complete absence of record on each of the following issues:

1. The authority of the District to enact an AAP;[2]

2. The extent to which the District conducted a full investigation of the need for an AAP, and the extent to which the AAP adopted meets the needs disclosed by the investigation;

3. Whether the 25 percent minority business enterprise participation requirement is reasonable, in light of the available subcontractors and contractors performing construction work in the Oakland area;[3]

4. The extent to which, if at all, the so-called "hearing" afforded by the District to rejected low bidders accords such bidders due process of law.

The Ninth Circuit simply "waived a wand" over all of these issues and concluded that the AAP passed constitutional muster. In doing so, it failed to subject the grave constitutional questions presented to the type of meticulous

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[2]The Ninth Circuit's opinion states that the Board has the "technical competence" to make findings of discrimination in the construction industry. 662 F.2d at 559. No. evidence is cited for this extraordinary assertion, beyond the statement that "[the Board] has ample experience in evaluating school construction bid proposals, and in analyzing the operations of those firms whose bids it has considered." *Id.* The competence of the Board to pass on the adequacy of construction bid proposals has nothing whatever to do with the competence of the Board to determine the causes and appropriate remedies for racial discrimination in the United States.

[3]The Ninth Circuit's opinion compares the percentage of blacks in the population of the City of Oakland as of July 1, 1970 (34.5%) with the number of school construction contracts awarded to minority contractors between the years 1947 and 1975. 662 F.2d at 559. This "apples and oranges" comparison underlines the need for a full trial on the merits in this action. There is nothing in the court of appeal's opinion or in the record below to support the appellate court's assumption that there is any relationship between the ethnic makeup of the City of Oakland as of July 1, 1970 and the number of general contractors from minority backgrounds who received school construction contracts over a 28-year period.

examination and careful analysis which must always be utilized in passing upon such issues.

C. The Ninth Circuit Has Misapplied the Tests Developed by This Court in *Fullilove* and *Bakke* to Test the Constitutionality of Affirmative Action Programs.

In addition to the obvious lack of evidence on which to base any meaningful analysis, there are two fundamental flaws in the Ninth Circuit's evaluation of the AAP promulgated by the Oakland Unified School District. First, the Ninth Circuit brushes aside the question of whether the district has authority to promulgate such an affirmative action program at all. The Ninth Circuit's opinion contains no analysis of any statutory or historical authority which would permit the School Board to adopt such a program. Instead, the Ninth Circuit relies upon a broad-brush declaration that "it is perfectly appropriate that the School Board be the body to assert an interest in remedying the effects of past discrimination in this particular industry. The School Board is charged with the vital responsibility of educating children. . . . We see nothing improper in the School District's laudable desire to set an example to the children whom it is responsible for educating." 662 F.2d at 559.

In *Fullilove v. Klutznick*, 448 U.S. 448, 100 S.Ct. 2758 (1980), this Court specifically emphasized the critical importance of finding that the governmental body fashioning an affirmative action program have the authority to establish racial preferences. The Court noted that in enacting the MBE provision at issue in *Fullilove* "it is clear the Congress employed an amalgam of its *specifically delegated powers*." ___ U.S. at ___, 100 S.Ct. at 2771. This Court found, in section 5 of the Fourteenth Amendment, a "positive grant of legislative power" authorizing Congress to utilize its discretion in determining whether legislation is required to

secure the guaranties of the Fourteenth Amendment. ___ U.S. at ___, 100 S.Ct. at 2774.

In concurrence, Justice Powell noted: "Because the distinction between permissible remedial action and impermissible racial preference rests on the existence of a constitutional or statute violation, the legitimate interest in creating a race-conscience remedy is not compelling unless an appropriate governmental authority has found that such a violation has occurred. In other words, two requirements must be met. First, the governmental body that attempts to impose a race-conscience remedy *must have the authority to act in response to identified discrimination*. Second, the governmental body must make findings that demonstrate the existence of illegal discrimination. In *Bakke*, the Regents failed both requirements. They were entrusted *only with educational functions*, and they made no findings of past discrimination." ___ U.S. at ___, 100 S.Ct. at 2785 (Citation omitted; emphasis added).

It is clear that both Chief Justice Burger's opinion and that of Mr. Justice Powell require substantial evidence that the governmental body promulgating a regulation which contains a racial preference has authority to do so. That test has not been met in this case. The Ninth Circuit cites no authority for the proposition that the Oakland Unified School District ought to act as champion of social justice, rectifying racial imbalance in the construction industry.[4] The true mission of the School District, like that of the Board of Regents of the University of California in *University of*

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[4]This Court, and numerous other courts, have struck down racially discriminatory regulations promulgated by administrative agencies lacking explicit authority to establish such preferences. *See Hampton v. Mow Sun Wong*, 426 U.S. 88, 96 S.Ct. 1895 (1976); *Romeo Community Schools v. HEW*, 600 F.2d 581 (6th Cir. 1979); *Junior College District v. Califano*, 597 F.2d 119 (8th Cir. 1979), *cert. denied*, 444 U.S. 972, 100 S.Ct. 467 (1980); *Islesboro School Committee v. Califano*, 593 F.2d 424 (1st Cir. 1979); *Central Alabama Paving, Inc. v. James*, 499 F. Supp. 629 (M.D. Ala. 1980).

California v. Bakke, 438 U.S. 265, 309-10, 98 S.Ct. 2733, 2757-58 (1978), is the education of students.

The Ninth Circuit's absurd assertion that justification for adoption of the program can be found in the School District's obligation to set an "example" for school children would justify virtually any local public agency taking any act which might burnish its image in the eyes of the public.[5] Surely this cannot be the standard for evaluating programs which adopt constitutionally suspect racial preferences.

The second major flaw in the constitutional "analysis" applied by the Ninth Circuit is that it overlooks the obvious and blatantly illegal features of the AAP.

The Ninth Circuit's opinion blithely asserts that the 25 percent minority business enterprise participation requirement contained in the AAP "is not unnecessarily high." 662 F.2d at 559. Yet no information about the percentage of contractors and subcontractors performing school construction who are minorities is cited anywhere in the opinion, nor is there any indication that the School District had any such information. Instead, the Ninth Circuit relies on statistics which show the percentage of non-whites in the population of the City of Oakland. *Id.* These population statistics, while interesting, demonstrate nothing about the availability of minority subcontractors to perform specialized construction work.

Incredibly, the Ninth Circuit opinion then goes on to state that "the Oakland plan is closer to one merely considering race as a factor . . . than to a regime of strict racial quotas."

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[5]The Court's assertion that the adoption of the AAP will set a good "example" for school pupils, 662 F.2d at 559, is especially puzzling. Does the Ninth Circuit mean to imply that school pupils are aware of the ethnic identity of construction contractors who are awarded contracts by the School District? If the Ninth Circuit intended to indicate that a good "example" could be set by employing minority *workmen*, its concern is misplaced. The AAP which is challenged here relates only to minority-*owned* businesses, not to the employment practices of such businesses.

662 F.2d at 559. It is difficult to credit this statement, since nothing in the AAP suggests that the School District has any intention of departing from a strict 25 percent quota.[6] The "hearing" which is provided under the AAP sets no standards of proof which would permit a contractor to establish his good faith, but unavailing, efforts to comply with the minority business enterprise participation requirement.

Indeed, the AAP contains no standards whatsoever to govern the Board's determination as to whether an otherwise competent low bidder shall receive a contract, except the following:

> "The Board may award the contract notwithstanding noncompliance with its Affirmative Action Policy only where it finds that the contractor has taken every possible measure to comply, that it is not practicable to demand compliance in the particular case, and that it is in the best interests of the School District to award the contract."

Exhibit D to Petition for Writ of Certiorari.

These cryptic "standards" for waiving the requirements of the AAP would be virtually impossible to comply with. How could a contractor demonstrate that he had "taken every *possible* measure" to comply with the AAP? And how is it to be decided that "it is in the best interests of the School District to award the contract" to the lowest bidder?

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[6]Although the Ninth Circuit insists that the AAP does not impose a "quota," the parties below stipulated that Schmidt & Pollard had "made every reasonable effort to obtain minority subcontractor bids for this project, and were unable to do so." (Joint Statement, ¶D.15.) Yet Schmidt & Pollard was still denied the contract. Obviously, the minority business enterprise percentage specified in the AAP is not a "round number" for guidance of contractors, but a very rigid quota, which can cause a contractor to lose a contract even if he has used his best efforts to comply. This is exactly the type of fixed percentage requirement which was found unconstitutional in *University of California v. Bakke*, 438 U.S. 265, 98 S.Ct. 2733 (1978).

It seems clear that the "hearing" afforded by the AAP is nothing more than a kangaroo-court process, designed to rubber-stamp the District's preliminary decision.

D. The Ninth Circuit's Opinion Raises the Possibility That Local Public Agencies Will, Without Statutory Sanction, Create Widely Disparate Affirmative Action Programs With a Racially Discriminatory Impact.

It cannot be doubted, as the Ninth Circuit noted in this case, that an Affirmative Action Program which mandates that a specified percentage of construction work be allocated to minority business enterprises discriminates on the basis of race. Such a program necessarily excludes white male contractors from participation in a certain portion of construction work solely on the basis of gender and ethnicity. This is the reason such programs have traditionally been subjected to strict scrutiny.[7]

As we have already noted at length, there is a conspicuous absence of such scrutiny in the Ninth Circuit's evaluation of the AAP promulgated by the Oakland Board of Education. What is more alarming, however, is the possibility that the Ninth Circuit's decision in this case will open the door to the promulgation of such programs by other local public agencies, acting without any statutory authority whatsoever. The Ninth Circuit's opinion amounts to a finding that is not necessary for a local public agency to have specific authority to investigate and remedy problems of racial

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[7]It is important to understand that the opportunity for discrimination which exists in *employment* decisions does not exist in the award of construction contracts by public agencies. Since public agencies must, by law, award such contracts to the "lowest responsible bidder," there is no opportunity to make a discriminatory determination of the qualifications of a contractor based on race or other impermissible factors. See *Inglewood-Los Angeles County Civic Center Authority v. Superior Court*, 7 Cal. 3d 861, 500 P.2d 601 (1972).

discrimination before it acts to end such problems. Instead, the Ninth Circuit suggests that it is appropriate for a school board to enact a racially discriminatory Affirmative Action Program "to set an example to the children whom it is responsible for educating." 662 F.2d at 559.

If this is any sanction for the enactment of an Affirmative Action Program, it is certainly a curious one. Almost any "benevolent" activity in which a public agency might engage could be excused as setting an "example" for the constituency served by that agency. This is hardly justification, however, for a public agency to wander beyond the limits of its statutory authority and promulgate programs in areas in which it is incompetent to act.

A California school board is "merely an administrative agency created by statute and invested only with the powers expressly conferred, subject to the limitations thereto attached by the legislature." *Grigsby v. King*, 202 Cal. 299, 304, 260 P. 789 (1927). Nothing in the California Education Code purports to give local school boards the power to promulgate far-reaching programs designed to eliminate racial discrimination in the construction industry.

If the Ninth Circuit's opinion is allowed to stand, it appears that any local public agency would have authority to conduct its own investigation of racial and sex discrimination, make its own findings, and adopt its own program to remedy such discrimination. The absurdity of such a result is obvious.

V.
CONCLUSION

For the reasons stated herein, amicus curiae AGC urges that the Petition for Writ of Certiorari be granted.

Respectfully submitted,

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Amicus Brief

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No. 81-1444
IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

JOHANN SCHMIDT and LELAND POLLARD, individually and doing business as SCHMIDT & POLLARD, a California partnership,

Petitioners,

v.

OAKLAND UNIFIED SCHOOL DISTRICT, et al.,

Respondents.

BRIEF AMICI CURIAE OF NATIONAL ELECTRICAL CONTRACTORS ASSOCIATION, NORTHERN CALIFORNIA CHAPTER, AND SHEET METAL AND AIR CONDITIONING CONTRACTORS NATIONAL ASSOCIATION, GREATER OAKLAND CHAPTER, IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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I.

INTEREST OF THE AMICI CURIAE

Amicus curiae National Electrical Contractors Association, Northern California Chapter ("NECA"), is a nonprofit trade association of contractors engaged in electrical contruction work. Amicus curiae Sheet Metal and Air Conditioning Contractors National Association, Greater Oakland Chapter ("SMACNA"), is a nonprofit trade association of contractors engaged in sheet metal and air-conditioning work.

NECA and SMACNA represent subcontractors who have been significantly affected by the operation of the Minority Business Enterprise ("MBE") program adopted by the District. Amici believe that the decision of the court below, if permitted to stand, will result in the adoption of some kind of MBE program by virtually every local

governmental entity and district in the State of California.

If this Court upholds MBE programs such as that adopted by the District, then the historical practice whereby subcontractors are selected solely on the basis of the low bid will be irrevocably altered, and the racial or ethnic status of the subcontractor's owner will become more important than the amount of the bid. Such practices would substantially increase the cost of construction, and provide for preferential distribution of public monies solely on the basis of race.

We are not aware of any legislation which allocates directly appropriated governmental funds solely on the basis of racial status. However, funds for public construction are effectively "sanitized" by passing from the governmental entity to a prime contractor

for further allocation to various subcontractors. The net result of the operation of the MBE program has been to deprive white-owned subcontractors of the opportunity to compete on an impartial basis. Instead, even if a white-owned subcontractor has submitted the lowest monetary bid to a prime contractor, and is fully capable of performing the work, the prime contractor is effectively required to disregard that low bid and to award the subcontract to a competitor solely on the basis of racial status.

II.

SUMMARY OF ARGUMENTS

NECA and SMACNA, as amici curiae, wish to press three essential points in this brief:

1. We are not aware of any case in which this Court has considered whether a local governmental entity may allocate

limited resources by racial preference. However, the numerous opinions in the earlier cases in which this Court has considered governmental efforts to ameliorate the effects of racial discrimination have left the lower courts without clear and definitive guidelines. The opinions by different panels of the Ninth Circuit involving virtually identical MBE programs of the Oakland School District and the San Francisco School District, and the decision of the Supreme Court of Alabama involving a similar program, confirms that lower courts may selectively chose from various opinions of this Court in order to support diametrically opposed views. Unless and until this Court issues a definitive decision, local governmental entities will remain under intense pressure from minority groups to grant racial

preferences, and the courts will continue to grapple with the litigation concerning the myriad of programs which will be enacted. We believe that such ongoing political pressures and resulting litigation will exacerbate racial divisions. We urgently request that this Court grant the Petition in order to clarify this very important issue at the earliest possible time.

2. We do not think it essential that this case be remanded for trial by the district court. Rather, we believe that undisputed facts in the record demonstrate that the MBE program adopted by the District granted economic preference solely on the basis of race. Although this Court has held that such preferences are within the power of Congress, we submit that such preferences may not be granted by states or their subdivisions under the Fourteenth Amendment.

3. Although it was improper for the court below to reach constitutional issues, it would be proper for this Court to avoid the constitutional issue by finding that the MBE program conflicts with federal statutes.

III.

REASONS THE PETITION SHOULD BE GRANTED

A. This Court Should Resolve The Conflict Between The Courts Which Have Considered MBE Programs

This Court has decided several cases involving the efforts of private parties or governmental entities to ameliorate the present effects of past discrimination by granting preferences or special treatment on the basis of race. Lower federal courts and state courts have been unable to synthesize those decisions and to reach a consensus as to the rationale which should be applied in different fact situations. Compare the

decision of the court below with the earlier decision of the Ninth Circuit in Associated General Contractors v. San Francisco Unified School District, 616 F.2d 1381 (9th Cir. 1980); See also the decision of the Supreme Court of Alabama in Arrington v. Associated General Contractors, ____ So.2d ____ (1981), and the analysis of this Court's opinions in the majority and dissenting opinions of the California Supreme Court in Price v. Sacramento Civil Service Commission, et al., 26 C.3d 257, 604 F.2d 1365 (1980).

We wish to address the very significant distinctions between affirmative action plans involving employment, and MBE programs such as that adopted by the District.

In employment the wages for specific jobs are customarily set by the employer, and employees are then hired

on the basis of ability. Hiring an employee on the basis of ability to perform a particular job will achieve the greatest economic efficiency. If an employer, for arbitrary reasons such as race, sex, age, or other irrelevant criteria, refuses to hire the person with the greatest ability, or out of a failure to seek out the most qualified person, hires someone with lesser ability, then the employer will suffer a loss of efficiency. Accordingly, when the government insists that employees be hired on the basis of ability (represented by non-discrimination laws) and insists that employers seek out the most qualified persons (represented by affirmative action programs) the government is enhancing economic efficiency (although at increased administrative cost) and an employer cannot properly complain that the end result

sought to be achieved is inconsistent with the employer's best interests.

The analysis which supports non-discrimination and affirmative action programs in employment does not support MBE programs where construction contracts are awarded by competitive bidding to the lowest responsible bidder. The public agency is not seeking the best qualified individual to perform at a given price; rather, the agency is asking qualified contractors (i.e., capable of performing the work) to give the lowest price at which they will perform the construction, and agrees to award the work to the qualified bidder submitting the lowest bid.

The court below reasoned that all of the bidders are equally qualified, and thus race is a factor which may be considered in awarding the contract,

citing this Court's decision in Regents of the University of California v. Bakke, 438 U.S. 265 (1978). We submit that reliance on Bakke is completely misplaced. In public competitive bidding, all bidders are not equal; there is only one most qualified -- the contractor who submits the lowest bid. authorizing a local agency to consider race and thus disregard the low bid would completely undermine the competitive bidding statutes and open governmental construction contracts to the vices which all governmental agencies sought to avoid by competitive bidding -- the elimination of arbitrary selection of contractors through favoritism.

In Bakke, supra, this Court held that quota-type racial preferences are unconstitutional if adopted by local governmental agencies, the District cannot rely on earlier judical precedents

approving quota-type provisions as a remedy for prior employment discrimination, because the District itself has not been guilty of discrimination. Rather, the District is seeking to impose a quota as a purported remedy for unproven past discrimination by unidentified contractors.

In addition to the damages available to minority contractors for proven discrimination, there is no dispute that the District could refuse to grant a contract to a contractor who had discriminatorily refused to deal with a minority subcontractor or joint venturer on the public project in question. The California Attorney General has issued an opinion, 42 Cal. Op. Att'y Gen. 169 (1963), that a contractor guilty of discrimination on the project in question may be deemed nonresponsible and thus denied the contract.

B. The Court Should Hold That Federal Statutes Prohibit States From Granting Economic Preferences on the Basis of Race.

A "set aside," or direct racial preference, was found by this Court in Fullilove v. Klutznik, 448 U.S. (1980), to be an authorized means for increasing minority contractor participation under federal procurement programs. We do not believe the same authority may be granted to the states, for reasons discussed below.

Federal construction and procurement are the responsibility of the President and the executive branch, and their decisions could not normally be affected by "connections" or other improper favoritism. On the other hand, states' political subdivisions are peculiarly susceptible to such favoritism, particularly where, as in this case, decisions

concerning the MBE program are made by locally elected officials. Such discretionary power granted to local officials places virtually uncontrolled discretion in those officials to reward their friends and punish their enemies. It was largely conduct by local officials, exercising their discretion to the detriment of persons on the basis of race, which led to the passage of the Fourteenth Amendment. For this Court to permit local officials to exercise identical discretion under the guise of "affirmative action" would completely nullify the overriding intent of the Fourteenth Amendment. It is no accident that the Fourteenth Amendment did not grant the states or their subdivisions -- the very entities sought to be restrained -- the power to implement the Fourteenth Amendment's protection. Rather, the power was granted solely to

the Congress. Similar power cannot be vested in the states and their subdivisions without specific Congressional authority.

If states and local political entities are free to define preferred racial or ethnic classifications and thereafter grant or deny economic privileges pursuant to those arbitrary determinations, then the protections of the Fourteenth Amendment, as embodied in Sections 1981 and 1983, would be effectively nullified. Under the rationale of the court below, any preference could be validated upon a finding by the local entity of "identified discrimination" against the class sought to be protected. Apparently, under the court's rationale, the courts would not be required or possibly even authorized to determine the validity of those findings.

The court below noted that the disparity whereby minority contractors had not performed construction work in proportion to their representation in the population is substantially similar to that found at the national level by Congress. This finding, of course, cuts against the result reached by the court below. Congress, based upon that finding, adopted only limited remedial legislation pursuant to its power under Section 5 of the Fourteenth Amendment. Congress did not elect to amend either Section 1981 or 1983 to eliminate the protection otherwise available to nonminority contractors under this Court's decision in McDonald v. Santa Fe Trail, Transp. Co., 427 U.S. 273 (1976). Notwithstanding the failure of Congress to effect such amendments to those statutes, the court below has effectively found that local agencies --

the very entities sought to be prohibited from such arbitrary action by the Fourteenth Amendment -- may now effectively override the statutory protection otherwise available under 1981 and 1983.

If the state low bid laws seeking public construction at the lowest possible cost to the taxpayers are to work, and racial preferences avoided, it is imperative that all contractors bid on the same basis, and that purported "goals" also be prohibited. If prime contractors face substantial uncertainty as to the requirements applicable in connection with MBE requirements, then the competitive bidding statutes will not work in accordance with their purpose, and the subcontractor preferences will simply be disguised.

If a prime contractor knows that a minimum percentage of MBE participation is required, then the bidder can prepare

its bid on that basis, even though the bid may be higher than it could bid absent that requirement. For example, assume that a contractor on a project which has no MBE requirement would bid $10,000 based upon taking the lowest bids of all subcontractors. If that contractor has an MBE requirement of 25 percent, and must pay those minority subcontractors an additional $1,000 pursuant to their bids, then the minimum bid with a 25-percent requirement is $11,000. If the MBE program contains goals and "best efforts" conditions with provisions for waivers and hearings, then that contractor is in a dilemma: bid the lowest monetary amount and seek waivers; or bid a the higher amount and avoid having to obtain waivers. Different contractors will logically choose different solutions. Some contractors will bid higher amounts in order to

avoid a hearing, while others will bid lower amounts and endeavor to prevail in the hearings. The posture taken by a given contractor might well be influenced by political considerations. A contractor with political connections might choose the hearing procedure*. Conversely, a contractor with no local political connections or friendships would probably elect not to take that chance. The governmental entity, under those circumstances, it is not getting truly competitive bids.

CONCLUSION

The primary interest of the amici is in protection of the competitive bidding system on public projects. We believe that system requires the maintenance of

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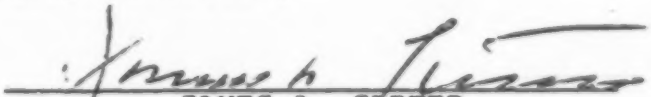
*That was not the situation in this case. Plaintiffs were forced to rely on a waiver provision because they were unable to obtain bids from minority subcontractors. Their lack of political connections is evident.

two essential elements -- first that the prime bidder know, with absolute certainty, the rules which will apply, in order that the prime bid may set forth the lowest possible price at which the prime bidder believes the work can be accomplished. The second critical element requires the utilization of the lowest bids from those subcontractors which are capable of performing the work. These conditions cannot survive if this Court approves the decision of the court below.

Respectfully submitted,



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